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COMMENTS

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A SPEECH OR DEBATE PRIVILEGE FOR STATE LEGISLATORS WHO VIOLATE FEDERAL CRIMINAL LAWS?

The concept of legislative independence in speech or debate is thoroughly entrenched in American political thought. Of common law origin, the concept is now embodied in Article 1 § 6 cl. 1a of the Federal Constitution which specifically provides that "for any Speech or Debate in either House [United States Senators and Representatives] shall not be questioned in any other place."[1] Most state constitutions have similar provisions.[2] However, although the speech or debate privilege is an accepted part of the American political tradition, difficult questions concerning its scope and meaning continue to arise in the process of applying the privilege to the facts of specific cases.

One particularly complex question was raised recently in *United States v. Craig*,[3] a Seventh Circuit case in which the court was asked to determine to what extent, if any, *state* legislators are protected by a speech or debate privilege in *federal* criminal prosecutions. The legislators in the *Craig* case were charged with violating the Hobbs Act[4] and the mail fraud statute[5] in their conduct *as state legislators*. Had they been federal congressmen, a significant portion of the Government's evidence against them would have been barred by the federal speech or debate clause. Had they been prosecuted by state authorities for violation of a state law, the Illinois constitutional speech or debate clause[6] would have had the same effect. The *Craig* court, in essence, had to determine whether this same evidence could be used against the legislators simply because it was the federal government that was prosecuting them for commission of a federal crime. Thus far the case has generated three different judicial opinions on this question. The district court held that the state legislators in question were protected by the Illinois constitutional speech or debate clause.[7] On appeal, a majority of a

[1] Article I, Section 6 also provides members of Congress with a separate privilege from arrest during sessions of Congress.

> The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendence at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.
>
> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

U.S. CONST. art. I, § 6.

[2] The Illinois constitutional provision is fairly typical:

> A member [of the General Assembly] shall not be held to answer before any other tribunal for any speech or debate, written or oral, in either House. . . .

ILL. CONST. art. IV, § 12.

Florida is the only state with no constitutional provision concerning legislative privilege of any kind. The constitutions of California, Iowa, Mississippi, Nevada and South Carolina provide only a privilege from arrest. (CAL. CONST. art. IV, § 11; IOWA CONST. art. III, § 11; MISS. CONST. art. IV, § 48; NEV. CONST. art. IV, § 11; S.C. CONST. art. 3, § 14. North Carolina gives legislators a right to protest action of the legislature. (N.C. CONST. art. 2, § 18). A list of the various state speech or debate clauses or similar provisions can be found in Tenney v. Brandhove, 341 U.S. 367, 375 n.5 (1951).

[3] 537 F.2d 957 (7th Cir. 1976).

[4] 18 U.S.C. § 1951 (1970).

[5] 18 U.S.C. § 1341 (1970).

[6] ILL. CONST. of 1970 art. IV, § 12.

[7] The unpublished district court opinion and orders were included in the brief for the United States to the court of appeals. *See*, Brief for the United States appendix A, B, C. 528 F.2d 773 (7th Cir. 1976).

three judge panel of the court of appeals held that they were entitled to a federal common law speech or debate privilege.[8] On rehearing, however, a majority of the full court held that no such federal common law speech or debate privilege exists. The legislators were only protected by common law official immunity.[9]

This comment will review the *Craig* decisions and the Supreme Court cases on which the judges of the district and appellate courts relied. While, as will be seen, there are no Supreme Court cases which speak directly to the problems raised by a federal criminal prosecution of a state legislator, it is the thesis of this comment that the third *Craig* opinion most accurately reflects the law of privilege as the Supreme Court has articulated it, either directly or by implication.

THE *CRAIG* DECISION

The District Court

In 1974, Robert Craig, Thomas Hanahan, and Louis Markert, members of the Illinois House of Representatives, were indicted for extortion and mail fraud. Count one of the indictment charged them with obtaining $1500 from members of the Illinois Car and Truck Renting and Leasing Association "under color of official right" in violation of the Hobbs Act.[10] In count two they were charged with defrauding the citizens of Illinois of their right to loyal and honest representation and their right to have the legislative business of Illinois conducted honestly by accepting $1500 to block the passage of a bill which would affect the automobile leasing business. Their conduct was alleged to violate the mail fraud statute.[11]

Prior to the indictment, Markert had been subpoened to testify before the grand jury investigating alleged corruption in the Illinois General Assembly. He had also voluntarily submitted to interviews with United States postal inspectors and with an Assistant United States Attorney. On all occasions he was represented by counsel and was informed of his fifth amendment privilege against self incrimination. He chose, nevertheless, to answer all questions put to him during the investigation.

After the indictment, Markert moved to dismiss on the grounds that the federal and Illinois speech or debate clauses[12] constituted an absolute bar to his prosecution. Although the district court[13] held that Markert was entitled to the protection of the speech or debate clause of the Illinois constitution,[14] it concluded that the scope of the clause was not so broad as to bar his prosecution for the crimes of extortion and mail fraud. The speech or debate privilege operated as a substantive bar to prosecution only if legislative acts were made the basis of a charge or if inquiry into the legislative process was a necessary and essential part of the prosecution.[15] Noting that "extortion and mail fraud

[8] United States v. Craig, 528 F.2d 773 (7th Cir. 1976).

[9] 537 F.2d 957 (7th Cir. 1976).

[10] 18 U.S.C. § 1951 (1970).

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000, or imprisoned not more than 20 years, or both.

(b) As used in this section—

(2)The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right. . . .

[11] 18 U.S.C. § 1341 (1970).

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter of thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

[12] *See* note 1 and note 2, *supra*.

[13] The opinion is unpublished. See note 7 *supra*.

[14] The court found that the federal speech or debate clause protected only federal legislators. Brief for the United States at app. 5.

[15] *Id.* at app. 8. The court reached this conclusion after an examination of United States v. Johnson, 383

are in no conceivable way part of the legislative process," and that the prosecution could proceed "without inquiry into the legislative process," the court refused to dismiss the indictment.[16]

Markert then moved to have his pre-indictment statements suppressed, claiming that they were obtained in violation of the speech or debate privilege. The court agreed that Markert was entitled to an evidentiary privilege to the extent that the government attempted to inquire into his motives for or actual performance of legislative acts, and it ordered the suppression of certain portions of his testimony before the grand jury. Some of his statements to the postal inspectors and the Assistant United States Attorney were suppressed as well. In answer to the Government's argument that Markert had waived his privilege by voluntarily making his statements, the court held that the speech or debate privilege was not personal and could not be waived by an individual legislator.[17]

The Panel Decision

The Government appealed the suppression order,[18] asserting that the Illinois speech or debate clause could not be invoked by Markert because privilege under state law was inapplicable in federal criminal prosecutions. Both Rule 26 of the Federal Rules of Criminal Procedure and Rule 501 of the Federal Rules of Evidence provide that privileges are to be controlled by "the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."[19] The Government argued that no federal common law speech or debate privilege existed, and that neither "reason" nor "experience" counseled the creation of such a privilege in this case.[20]

A three judge panel of the Seventh Circuit, with one judge concurring only in the result[21] agreed with the Government that under Rule 501 and Rule 26 "the admissibility of evidence in criminal cases in federal courts is governed by federal law and is not dependent upon diverse state laws, including state constitutional provisions."[22] The court, therefore, found that Markert could not invoke the protection of the speech or debate clause of the Illinois Constitution.

The panel next considered whether Markert was entitled to a federal common law speech or debate privilege.[23] It briefly reviewed several Supreme Court decisions interpreting the scope of the federal speech or debate privilege. Those decisions, according to the panel majority, indicate that the purpose of the federal provision is to prevent legislators from being threatened by prosecutions and convictions for the performance of their legislative duties. To insure this protection, the clause has both "substantive and evidentiary elements:" legislative

U.S. 169 (1966), and United States v. Brewster, 408 U.S. 501 (1971), cases in which the Supreme Court reached a similar conclusion with regard to the scope of the federal speech or debate clause. See discussion accompanying notes 100–112 and notes 113–129 *infra*.

[16] Brief for the United States at app. 8.

[17] Brief for the United States at app. 15. This holding on the question of waiver was subsequently reversed by the court of appeals panel decision, 528 F.2d 773, 780 (7th Cir. 1976). The opinion of the full court, after rehearing, did not reach the issue of waiver, 537 F.2d. 957, 958 (7th Cir. 1976). Because the issue of waiver is tangential to the focus of this comment, it will not be further discussed in the body of the paper.

[18] 18 U.S.C. § 3731 (1970) allows the Government to appeal interlocutory rulings on the suppression of evidence.

[19] The language of both rules is essentially identical except that Rule 501 contains an additional provision that state law is to govern privileges in civil cases in which state law supplies the rule of decision.

[20] In the alternative, the Government argued that any privilege which did exist should be considered personal and therefore waivable by the individual legislator. Brief for the United States at 36.

[21] 528 F.2d 773 (7th Cir. 1976). Judge Cummings wrote the majority opinion for himself and Judge Kunzig, Judge of the United States Court of Claims sitting by designation. Judge Tone, whose position differed substantially from that of the other two members of the panel, wrote a separate, concurring opinion which is discussed in the text accompanying notes 39–46 *infra*.

[22] 528 F.2d at 776.

[23] The court did not discuss whether the federal speech or debate clause protects state legislators. One Fourth Circuit case, Eslinger v. Thomas, 476 F.2d 225, 228 (4th Cir. 1973), suggests that the Supreme Court extended the federal clause to the states in Tenney v. Brandhove, 341 U.S. 376 (1951). However, such a suggestion seems clearly wrong. The Supreme Court does not even consider *Tenney* a speech or debate clause case. United States v. Brewster, 408 U.S. 501, 516 n.10 (1972). Furthermore, no constitutional vehicle such as the fourteenth amendment exists by which an article, rather than an amendment, of the Constitution can be made binding on the states, and Article I, § 6 on its face applies only to the Federal Congress. *See*, Brief for the United States at 15 n.32.

acts cannot be made the basis of civil or criminal liability, and legislators cannot be made to answer questions about either their legislative activities or their motives for performing those activities.[24] Only the evidentiary aspect of the privilege was before the panel. The majority characterized it as a "necessary prophylatic"[25] and maintained that its purpose was "the same as that of the substantive aspect of the Speech or Debate Clause: preservation of the independence of the legislature."[26]

The Government argued, however, that independence of the legislature is only a concern when co-equal branches of the government are involved. At the federal level, the speech or debate clause serves a separation of powers purpose, "preserving the balance of power among the three co-equal branches of government."[27] Because the federal government was prosecuting a state official in the instant case, there was no question of "intra-federal power" being upset:

> The power to prosecute [Markert and the other legislators] . . . evolved from the co-equal functioning of all three federal branches. Congress . . . passed the laws on which the prosecution rests; the executive . . . elected to pursue the case; and the judiciary awaits to hear it.[28]

The real issue, according to the Government, was whether failure to recognize a legislative privilege for state legislators in federal court would interfere with a legitimate state interest, since under a federal system of government national interests may not be protected "in ways that . . . unduly interfere with the legitimate activities of the states."[29] Although admitting that states clearly have an interest in free legislative debate, the Government argued that absence of legislative privilege would not hamper that free debate. It maintained that the protection of the first amendment and the doctrine of official immunity would insure freedom of speech in state legislatures:

> The first amendment, as interpreted today, protects all citizens from criminal prosecution on the basis of the type of political expression which gave rise to the doctrine of Speech or Debate. Absent separation of powers considerations, there is no corresponding benefit to be gained from extending the privilege beyond the ambit of first amendment protections.
>
> To the extent that the first amendment would not immunize state legislators from civil suits for libel and slander, the doctrine of official immunity would provide the necessary protection.[30]

Furthermore, the Government argued, the states have a legitimate interest in obtaining federal assistance in the area of crime control, and that interest would be furthered "by the federal government's attempt to use its resources to assist in excising the malignancy of local political corruption."[31]

The panel majority felt strongly that the government's position ignored the basic concept of federalism envisioned by the drafters of the Constitution: the national government was designed to be one of limited powers and the states were to continue as essential units of government.[32] According to the two judge majority, state legislators have as vital a role to play in the government of a state as Congress has in the government of the nation. Independence of the state legislatures cannot, therefore, be dismissed as irrelevant.

> Although the speech or debate privilege embraces notions of the separation of powers among co-equal branches of government, its pri-

[24] 528 F.2d at 777.

[25] *Id.* at 778.

[26] *Id.*

[27] Brief for the United States at 29.

[28] *Id.*

[29] *Id.* at 30, *quoting* Younger v. Harris, 401 U.S. 37, 44 (1971).

[30] Brief for the United States at 32 n.64. For its first amendment argument the Government relied on Bond v. Floyd, 385 U.S. 116 (1966), in which the Supreme Court said:

> The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.

385 U.S. at 136. This case is discussed in the text accompanying notes 198–205 *infra*.

[31] Brief for the United States at 32.

[32] The majority used the tenth amendment to buttress this argument: "The reservation of power for the states is . . . the import of the Tenth Amendment. . . ." 528 F.2d at 778. Yet it is clear today, as one commentator has noted, that "the Tenth Amendment does not shield the States nor their political subdivisions from the import of any authority affirmatively granted to the Federal Government." E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY, 372–73 (1974). Thus, if the federal government has the power to reach the conduct of the legislators, the tenth amendment does not take away that power simply because its exercise interferes with the state's own exercise of power.

> mary message is that legislatures must be able to discharge their lawful responsibility in an atmosphere free from the threat of interference by other governmental units. A legislator in considering whether to support or oppose a proposed law must be free to reflect on the merits; he must not be deterred from advocating a position by the threat of prosecution by a hostile executive. The evil is the fact of deterrence; whether the threat emanates from the local or national executive makes no difference.
>
> This threat to the legislature's independence is fundamentally inconsistent with the idea of legislative action reflected in the policy, purpose and history of the privilege and inherent in the words: "for any Speech or Debate in either House, they shall not be questioned in any other Place." U.S. CONST. art. I § 6. Deterring a legislator from advancing a point of view, or influencing how he votes by requiring him to explain his motives before a grand jury is precisely the evil the speech or debate privilege intends to prevent.[33]

Protection of the first amendment was not enough because the amendment provides no privilege against giving testimony, even if that testimony involves inquiry into a legislator's motive for a particular vote or other legislative act.[34] Consequently, "in view of the purposes of the speech or debate privilege, its common law history, and the important role of the states in governing the country," the majority concluded that state legislators are protected in federal criminal prosecutions by a federal common law speech or debate privilege.[35] The panel did leave open the possibility that the privilege might be abrogated by Congress in a narrowly drawn statute,[36] but it was unwilling to "abolish"[37] the privilege by "judicial fiat in a federal criminal prosecution under a statute of general applicability."[38]

Judge Tone, concurring in the result,[39] agreed that the Illinois constitutional speech or debate clause was inapplicable in federal criminal prosecutions. But he disputed the panel majority's position that a legislator could claim a similar privilege under federal common law. Citing the same cases as the majority, he maintained that while state legislators are entitled to protection from liability for acts performed in furtherance of their legislative duties, the basis of that protection is not the federal speech or debate clause, but the common law doctrine of official immunity.[40] As for the evidentiary privilege, Judge Tone asserted that any privilege against disclosure must be "commensurate" with the underlying immunity from liability. But,

> where there is no immunity, it would be incongruous if not useless, to recognize an evidentiary privilege. Accordingly, whether the claimed privilege should be recognized as a development in the federal common law of evidence depends on whether there is an underlying immunity.[41]

He then pointed out that the doctrine of official immunity has never been extended into the area of criminal liability:

> Immunity from civil but not criminal liability has been regarded as sufficient to achieve the purpose of the doctrine of official immunity, which is to promote independence and fearless discharge of duty on the part of the protected officials.[42]

Therefore, according to Judge Tone, state legislators are subject to federal criminal liability if they violate a federal criminal statute, even if they are acting within their legislative role.

On the other hand, federal congressmen are afforded considerably broader protection by the federal speech or debate clause because it not only promotes independence but serves

[33] 528 F.2d at 778–79.

[34] *Id.* at 779.

[35] *Id.*

[36] The court's position was similar to that of the Court in United States v. Johnson, 383 U.S. 169 (1966), in which the issue of whether inquiry might be made into the legislative acts of Federal Congressmen in a prosecution under a narrowly drawn statute passed by Congress in the exercise of its power to regulate congressional conduct was expressly left open.

[37] 528 F.2d at 779.

[38] 528 F.2d at 779. Although the majority held that Markert was protected by a federal common law speech or debate evidentiary privilege, it remanded the case with directions to overrule the suppression order. Both Judge Cummings and Judge Kunzig felt that the legislative privilege was a "personal" privilege of the legislator and that Markert, by voluntarily testifying, had waived his protection. *Id.* at 780–81.

[39] *Id.* at 781. Judge Tone concurred on the basis of the reversal of the suppression order.

[40] *Id.* at 782.

[41] *Id.*

[42] *Id.* at 783.

"an additional more fundamental purpose grounded in the separation of powers in the federal government."[43] Seeing no separation of powers problem in the prosecution of a state legislator by the federal executive,[44] and noting that the Federal Constitution itself "does not create an immunity for state legislators"[45] Judge Tone maintained there was no reason for the federal judiciary to create such an immunity.

> Nothing in our history or in the authorities relied upon by the court in this case suggests that there is a threat of federal executive interference with the independence of state legislatures that would warrant extending the judicially developed doctrine of official immunity beyond its traditional boundaries. Accordingly, I would hold that the state legislator's official immunity does not extend to liability under federal criminal statutes, and that he therefore has no commensurate official privilege against disclosure.[46]

The Full Court Decision

The Government petitioned the court for a rehearing en banc. A majority[47] of the full court agreed with Judge Tone's position and voted to reverse the panel decision that the legislators were entitled to the protection of a federal common law evidentiary speech or debate privilege.[48] The court made special note, however, that

> the absence of a privilege has no relationship to the proof necessary to establish a crime involving official corruption; and that although a legislator's voting record and other legislative conduct is not privileged from inquiry it would not, standing alone, support an inference of wrongdoing or improper motive. Proof *aliunde* will be required.[49]

Three judges disagreed with the majority on the issue of privilege.[50] Judge Cummings and Judge Swygert felt the legislators were protected by a federal common law privilege.[51] Chief Judge Fairchild, on the other hand, felt that because of the "constitutional relationship between the states and the United States," the court should honor and give effect to the speech or debate clause of the Illinois Constitution.[52]

The Competing Theories: Speech or Debate Privilege versus Official Immunity

As the court of appeals panel decision makes clear, the decision to fashion a common law speech or debate privilege rather than apply the Illinois state constitutional privilege is dictated by the federal rules of evidence. In terms of practical effect on the legislators in *Craig*, however, there is little difference in result. Although there has been no definitive interpretation of the Illinois provision, it is worded almost identically to the federal constitutional provision and there is no reason to suppose that the Illinois courts would not closely follow the Supreme Court's interpretation of the federal clause. Similarly, those same Supreme Court decisions which interpret the federal clause examine the origin of the concept of legislative privilege, and naturally provide an authoritative source for determining the parameters of a common law speech or debate privilege.

[43] *Id.*

[44] The relationship between the states and the federal government is not usually characterized as a separation of powers question. *See* Pierson v. Ray, 386 U.S. 547, 564–65 (1967): "The doctrine of separation of powers is, of course, applicable only to the relations of coordinate branches of the same government, not to the relations between the branches of the Federal Government and those of the States." *Cf.* Baker v. Carr, 369 U.S. 186, 210 (1962), "[I]t is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'"

[45] 528 F.2d at 783.

[46] *Id.* (footnotes omitted).

[47] Judges Pell, Sprecher, Tone, Bauer and Wood made up the majority.

[48] 537 F.2d 959 (7th Cir. 1976). The opinion of the full court does not re-analyze the issue, but merely adopts Judge Tone's concurring opinion from the panel decision.

[49] 537 F.2d at 958–59 (*emphasis in original*).

[50] There was less disagreement on the question of whether the suppression order should be reversed. Seven of the eight judges voted for reversal on that issue.

[51] Judge Cummings adhered to his views in the panel majority opinion that the legislators were protected by a federal common law speech or debate privilege; but that Markert had waived his privilege by voluntarily testifying. Judge Swygert agreed with Judge Cummings on the existence of the privilege, but he felt the privilege had not been waived. 537 F.2d at 958–59.

[52] *Id.* at 959. Chief Judge Fairchild voted to reverse the suppression order, however, because he felt Markert had waived the privilege.

On the other hand, of crucial importance to the legislators in *Craig* is the question of whether the "principles of common law" and relevant Supreme Court decisions dictate the application of a privilege based on the speech or debate clauses of the federal and state constitutions, or one based on the similar but narrower principles underlying the doctrine of official immunity. Developing an answer to this question involves an understanding of the English common law origin of the privilege, its Americanization as it was incorporated into the constitutional structure of the United States, and its relationship to the common law doctrine of official immunity.

Development of the Speech or Debate Privilege

The concept of legislative privilege in speech or debate was brought to the United States from England where it had developed as a consequence of the long struggle for political supremacy between the Crown and Parliament.[53] The English battle was two pronged. Parliament had to fight not only for freedom of speech and deliberation, but also for the right to initiate legislation.[54] Particularly during the reign of the Tudors and the Stuarts, the Crown resisted the growth of Parliamentary power. Throughout this period members of Parliament were subject to arrest, imprisonment or banishment from Parliament both for speeches which displeased the Crown and for "meddling with matters of state" which were considered to be the sole perogative of the Crown.[55]

Parliament responded to actions taken against its members by passing legislation declaring that all prosecutions based on parliamentary proceedings were void,[56] and by claiming, in petitions to the Crown at the beginning of each Parliament, that freedom of speech was its "ancient and undoubted right and inheritance."[57] The English monarchs yielded to this assertion of privilege in varying degrees. Elizabeth I, for example, apparently acknowledged "freedom of speech," but tried to qualify the privilege by defining it as the privilege to say "aye or no."[58] James I was also willing to recognize the existence of a privilege, but not as a parliamentary right. He maintained that any parliamentary privilege was a matter of royal "toleration" and that the King was therefore free, should the need arise, to "punish any man's misdemeanors in Parliament, as well during their sitting as after."[59] However, by the middle of the seventeenth century, Parliament appears to have won the battle for a complete and meaningful privilege. The privilege was embodied formally into the English Bill of Rights in 1689,[60] and its existence was never seriously questioned thereafter.[61] Subsequently, as the battle for political supremacy between the Crown and Parliament was resolved, the privilege came to be asserted more often against fellow citizens than against the King.[62] In its origin, however, the privilege was clearly asserted to assure the independence of Parliament from the power of the Crown.

The English Parliament's concern for independence was, of course, well known to those

[53] United States v. Johnson, 383 U.S. 169, 178 (1966).

[54] Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 132 (1910) [hereinafter cited as Veeder].

[55] *Id.* at 132–33. *See also* Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK L. REV. 1, (1968) [hereinafter cited as Cella].

[56] See *e.g.*, Privilege of Parliament Act 1512, 4 Hen. VIII, c.8. This Act arose out of the prosecution of Richard Strode, a member of the House of Commons, for introducing legislation to regulate tin mining. Although the Act clearly stated that prosecutions of all present and future members of Parliament for legislative acts were void, the Kings Bench later held that the Act was "private" and referred only to Strode. In 1667, Parliament formally declared the Act to be one of "general operation" declaring "ancient and necessary rights and privileges of Parliament." Veeder, *supra* note 54, at 132 n.5, 133–34.

[57] Veeder, *supra* note 54, at 132–33. Assertion of the privilege in the petition to the Crown was apparently begun in 1541. *Id.* at 132.

[58] *Id.* at 133. Veeder quotes the Queen as saying:

> Privilege of speech is granted, but you must know what privilege you have; not to speak everyone what he listeth or what cometh in his brain to utter that; but your privilege is, aye or no.

[59] *Id.*

[60] *Id.* at 134. *See also Comments on Recent Cases*, 50 IOWA L. REV. 893, 895 (1965). For a detailed discussion of the development of the English privilege, see Cella, *supra* note 55, at 1–13, and M. CLARKE, PARLIMENTARY PRIVILEGE IN THE AMERICAN COLONIES, 1–13 (1943) [hereinafter cited as CLARKE].

[61] Although the existence of the privilege was settled, its scope was still the subject of considerable debate. Cella, *supra* note 55, at 12.

[62] *Comments on Recent Cases*, 50 IOWA L. REV. 893, 895 (1965).

who founded the English colonies in America. Early colonial legislators expressed a similar concern for the independence of the colonial assemblies,[63] and the tensions that developed between the assemblies and the royal governors and English Parliament served to keep that concern alive throughout the colonial period.[64] From a legal standpoint none of the colonial assemblies possessed formally recognized parliamentary rights.[65] But, starting quite early in the colonial period, they began to ask the royal governors to recognize that they held privileges similar to those enjoyed by Parliament,[66] and gradually the custom of recognizing and granting legislative privilege to the colonial assemblies became thoroughly established.[67] Indeed, there is every indication that the colonists felt such privileges to be a matter of "right" which could not be denied.[68]

Immediately after the revolution, the Articles of Confederation[69] and the constitutions of several states[70] formally recognized the existence and importance of legislative privilege in the representative systems they sought to establish. A few years later, the drafters of the Federal Constitution did not even question the importance of legislative privilege. They adopted the federal speech or debate clause without dissent or significant discussion,[71] merely altering the wording of the English privilege to fit the American tripartite governmental structure.[72] As Justice Frankfurter was later to note, the clause was simply a "reflection of political principles already established in the states."[73] Those "principles already established" were not, however, adopted wholesale from England. Although the colonial assemblies had, in some sense, begun their existence as "small parliaments,"[74] the nature of the political structure in the colonial system, the physical isolation of the colonies from England, and the intense debate over the nature of government that raged throughout the colonial period[75] all combined to create uniquely American institutions in the colonies.

Scope of the Privilege

The first judicial consideration of the scope of legislative privilege in America appears in *Coffin v. Coffin*,[76] an 1808 case in which the Massachusetts Supreme Court was asked to interpret the meaning of the state constitutional speech or debate clause.[77] Interestingly, the case presented no issue of executive interference with the legislative branch, the evil the

[63] Cella, *supra* note 55, at 13; CLARKE, *supra* note 60, at 13.

[64] See CLARKE, *supra* note 60, at 90–131, for an excellent summary of some of the battles between the royal governors and the assemblies. As both Clarke and Cella make clear, the question of legislative independence was more complex in the colonies, since colonial assemblies were confronted not only with the power of the royal governors, but also with the power of the English Parliament. Cella, *supra* note 56, at 14; CLARKE, *supra* note 61, at 12. Many colonists apparently felt they owed no loyalty or duty to Parliament, their only obligation being to the King. W. BENNET, AMERICAN THEORIES OF FEDERALISM, at 15–37 (1964) [hereinafter cited as BENNET]. Parliament, of course, had other ideas.

[65] CLARKE, *supra* note 60, at 12.

[66] *Id.* at 61–92.

[67] *Id.* at 70.

[68] *Id.* at 79.

[69] ART. OF CONFED. V.

> Freedom of Speech and Debate in Congress shall not be impeached or questioned in any court or place out of Congress.

[70] MARYLAND DECLARATION OF RIGHTS, art. VIII, (1776):

> Freedom of speech and debates or proceedings, in the legislature, ought not to be impeached in any other court or judicature.

MASS. CONST. art. XXI (1780):

> The freedom of deliberation speech and debate in either house of the legislature, is so essential to the rights of the people that it cannot be the foundation of any accusation or prosecution, action, or complaint in any other court or place whatsoever.

N.H. CONST. art. XXX (1784):

> The freedom of deliberation, speech, and debate in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any action, complaint, or prosecution, in any other court or place whatsoever.

[71] Cella, *supra* note 55, at 14. Two amendments to the clause were offered and rejected. One would have made each house the sole judge of the privilege, the other would have defined the extent of the privilege. *Id.* at 14–15.

[72] The English privilege is phrased as follows:

> [T]hat the freedom of Speech and Debate or Proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

1 Wm. + M., sess. 2, c.2.

[73] Tenney v. Brandhove, 341 U.S. 367, 373 (1951).

[74] CLARKE, *supra* note 60, at 12.

[75] See BENNET, *supra* note 64 *passim*; and CLARKE, *supra* note 60, *passim*.

[76] 4 Mass. 1 (1808). This case is discussed in great detail in Cella, *supra* note 55, at 19–30.

[77] MASS. CONST. art. XXI (1780). See note 70 *supra* for text of provision.

privilege was originally designed to remedy. Rather, it involved a private citizen's suit for slander against a state legislator.[78]

William Coffin asked Benjamin Russell, a member of the Massachusetts House of Representatives, to introduce a resolution to increase the number of notaries public in Nantucket. Russell, an acquaintance of Coffin's, agreed. After the resolution passed, and the House had moved on to the consideration of other business, Micajah Coffin,[79] another representative, asked the sponsor of the resolution to identify the "respectable gentlemen from Nantucket" from whom he had received the information on which he had based the proposal. William Coffin was pointed out and Micajah Coffin was heard to exclaim, "What! That Convict?" and other words to the effect that an acquittal from bank robbery charges against William did not "make him any less guilty."[80] William then sued Micajah for slander.

Micajah raised the Massachusetts constitutional provision as a defense and argued, citing English precedents, that the effect of the clause was to make the Massachusetts House the sole judge of the privileges of its members. William Coffin, on the other hand, argued that the English experience was simply inapposite. The House could not be the sole judge of its own privileges under the Massachusetts constitutional form of government in which "the judiciary power is an original coordinate and independent branch of the government,"[81] and the court is established "as the supreme tribunal to determine the true meaning of each part of the constitution, as well as of the laws."[82]

Chief Justice Parsons, who wrote the opinion of the Court, agreed with William Coffin. While he was willing to concede that for "certain intents and purposes"[83] the House might be the exclusive judge of its privileges, he felt the court at least had the right and obligation to determine the "intent and design"[84] of the constitutional clause and whether it comprehended the particular conduct of the legislator. He then proceeded to interpret the clause expansively, in words that are still quoted today.[85]

> [Legislative privilege is secured] not with the intention of protecting the members against prosecutions for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution, of the office; and I would define the article as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber.[86]

However, in applying this interpretation to the facts before him, Judge Parsons took a surprisingly restrictive view of his own words and found that Micajah Coffin was not exercising the functions of his representative office at the time he called William a convict. Therefore, the privilege could not protect him against a suit for defamation.[87]

Despite its restrictive holding, and despite the fact that it was a state case and the clause being interpreted was broader than most other state clauses and the federal clause,[88] *Coffin* has

[78] At least one commentator has suggested that legislative privilege incorporated in the constitutions of the states was designed primarily as protection against fellow citizens of the legislator. Field, *The Constitutional Privileges of Legislators*, 9 MINN. L. REV. 442, 443 (1924–25). However, in view of the fact that the governmental structure of the states so closely parallels that of the federal government, it is probable that the constitutional clauses were intended to serve a separation of powers purpose as well.

[79] Micahah and William Coffin were not related.

[80] 4 Mass. at 4.

[81] *Id.* at 13.

[82] *Id.* at 9.

[83] *Id.* at 31.

[84] *Id.* at 78.

[85] *See e.g.*, United States v. Brewster, 408 U.S. 501, 514 (1972); Tenney v. Brandhove, 341 U.S. 367, 373–74 (1951).

[86] 4 Mass. at 27.

[87] *Id.* at 29–30, 36. For a criticism of the court's application of its own interpretation, *see* Cella, *supra* note 55, at 28–30.

[88] The Massachusetts clause, quoted in full in note 70 *supra*, protects deliberation, speech and debate, and forbids prosecutions, actions and complaints in anyplace whatsoever outside the legislature.

had considerable influence in later judicial interpretations of the meaning of legislative privilege. The Supreme Court in *Kilbourn v. Thompson*,[89] for example, relied heavily on the language, though not the holding, of *Coffin*.

Kilbourn was the first judicial interpretation of the federal privilege. A committee of the United States House of Representatives had summoned Kilbourn to give testimony. When Kilbourn refused, the committee voted to arrest and imprison him for contempt. Kilbourn brought suit for false imprisonment against both the members of the committee who voted for the resolution authorizing his arrest and the sergeant-at-arms who arrested him.

After citing with approval Justice Parson's dictum in *Coffin*,[90] the Court took a similar approach to the interpretation of the federal privilege:

> It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it.[91]

On the basis of this interpretation, the Court went on to find that the members of the committee were immune from suit. While there might be "things done, in the one House or the other, of an extraordinary character, for which members who take part in the act may be held legally responsible,"[92] on the facts presented, even though the committee was acting beyond its authority when it issued the order against the recalcitrant Mr. Kilbourn,[93] the act of voting for a resolution was one of those "things generally done in a session of the House . . . in relation to the business before it."[94] It was, therefore, protected by the federal legislative privilege.

Because the *Kilbourn* Court explicitly expanded the protection of the federal clause beyond pure speech or debate to encompass protection for legislative acts, the case is frequently cited for the proposition that the clause must be construed liberally "to effectuate its purposes."[95] The holding of the Court was not as liberal as it might have been, however, for the Court refused to absolve the sergeant-at-arms from liability for carrying out the committee order. As the order issued by the committee was "without authority,"[96] the arrest of Kilbourn was illegal. Since the sergeant-at-arms was only a legislative functionary, not a legislator, he was unprotected by the legislative privilege and subject to suit for false imprisonment. This principle, that employees who implement the policies of legislators may be subject to suit even though the legislators themselves are not, at least arguably interferes with the independence of the legislature.[97] But it also helps protect the public against abuses of the legislature, without violating the literal wording of the constitutional privilege.[98] Thus, although *Kilbourn*, like *Coffin*, stressed the importance of the independence of the legislature, it effectively compromised on the full implications of this principle.

With the exception of *Tenney v. Brandhove*,[99] *Kilbourn* was the only major Supreme Court decision on the subject of legislative privilege until *United States v. Johnson*[100] was decided

[89] 103 U.S. 168 (1881).

[90] *Id.* at 203–04.

[91] *Id.* at 204.

[92] *Id.* The Court has continued to leave open the possibility of congressional liability for "extraordinary" conduct, although it has never been faced with such a case. *See e.g.*, Powell v. McCormack, 395 U.S. 486, 506 n.26 (1969).

[93] *Id.* at 200.

[94] *Id.* at 204.

[95] United States v. Johnson, 383 U.S. 169, 180 (1966).

[96] 103 U.S. at 200.

[97] The legislature needs the help of non-legislative employees in carrying out its functions. It may find it difficult to hire them if they are subject to liability when in good faith they carry out a legislative order that turns out later to be without authority.

[98] The Court has frequently permitted legislative functionries to be sued when suit against Congressmen was prohibited by the clause. *See e.g.*, Doe v. McMillan, 412 U.S. 306 (1973) (suit not allowed against Congressmen for allegedly slanderous material in a committee report, republished and distributed to the public, but suit against government printer allowable); Powell v. McCormack, 395 U.S. 486 (1969) (suit against Congressmen for vote to exclude representative Powell from Congress not allowed; suit allowed against House aides implementing the invalid resolution); Dombrowski v. Eastland, 387 U.S. 82 (1967) (suit prohibited against Chairman of Senate subcommittee, but allowed against subcommittee counsel).

[99] 341 U.S. 367 (1951). This case is discussed fully in the text accompanying notes 167–97 *infra*.

[100] 383 U.S. 169 (1966). Along with *Kilbourn*, *John-*

eighty-five years later. Johnson was a United States Congressman alleged to have taken a bribe to use his influence to obtain the dismissal of indictments against certain officials of savings and loan institutions. He was indicted for violation of the federal conflict of interest statute[101] and for conspiracy to defraud the United States.[102] An essential piece of evidence used against him on the conspiracy count was a speech favorable to savings and loan associations which he had delivered in Congress. The Court of Appeals for the Fourth Circuit held that the use of such evidence was precluded by the speech or debate clause.[103] It reversed his conviction, dismissed the conspiracy charge and remanded the case for a new trial on the conflict of interest issue.[104]

Although the Supreme Court had never before considered whether the speech or debate clause granted any sort of immunity in situations in which criminal conduct was intertwined with legislative acts,[105] it had little difficulty in affirming the court of appeals' decision that Johnson's conviction on the conspiracy count could not stand. Its approach to the question was essentially historical. It noted that the primary impetus for the development of legislative privilege was not the fear of private civil suits such as that in *Kilbourn,* but fear of "intimidation" of the legislature by the "instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum."[106] That same fear, according to the Court, formed the "predominate thrust of the Speech or Debate Clause" under the "American system of separation of powers"[107] in which the clause not only helps assure the independence of the legislature, but also reinforces the separation of the three branches of the government.[108] In light of both its historical development and the concept of separation of powers, the Court concluded that the clause prevents not only prosecutions based on the content of a legislator's speech, but also those prosecutions which inquire into the legislator's motivation or intention for the performance of any legislative act.

The Government could not, therefore, maintain a case against Johnson which in essence charged him with improper motivation in his legislative conduct. The Government had inquired extensively into the wording of his speech, his personal knowledge of the facts included in it and the way in which the speech was prepared. In short,

> the conspiracy theory depended on a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech.[109]

His prosecution on this basis violated both the letter and the spirit of the speech or debate clause. The Court was careful to note, however, that its holding was "limited to prosecutions involving circumstances such as those presented in this case"[110] in which the Government's inquiry into the Congressman's motive was not an "incidental" part of its case, but central to the proof of criminal conduct. The decision did not affect "prosecutions which though . . . founded on a criminal statute of general application, do not draw in question the legislative acts of the defendant member of Congress or his motives for performing them."[111] Thus, although Johnson was entitled to an evidentiary privilege insofar as the Government attempted to prove his participation in a conspiracy to defraud the government by reference to his legislative conduct, the Government was not precluded from showing criminal conduct on the basis of other evidence. Since the making of the speech was only part of the

son is also cited for the proposition that the speech or debate clause must be construed liberally. Doe v. McMillan, 412 U.S. 306, 311 (1973).

[101] 18 U.S.C. § 281 (1964).

[102] 18 U.S.C. § 371 (1970).

[103] 337 F.2d 180 (4th Cir. 1964), *aff'd* 383 U.S. 169 (1966).

[104] The court felt that evidence of the speech had unfairly prejudiced the determination of Johnson's guilt on the conflict of interest charges. *Id.* at 204.

[105] In Burton v. United States, 202 U.S. 344 (1906), the Court found that the speech or debate clause provided no protection to a legislator charged with criminal conduct outside the sphere of legislative activity. (The charge was bribery to influence the Post Office Department to quash an indictment.) *Cf.* Williamson v. United States, 207 U.S. 425 (1903) (The constitutional privilege from arrest, U.S. CONST. art. 1 § 6, provides no protection to a legislator charged with criminal conduct although his imprisonment would prevent him carrying out his congressional duties.)

[106] 383 U.S. at 181, 182.

[107] *Id.* at 182.

[108] *Id.* at 178.

[109] *Id.* at 177.

[110] *Id.* at 185.

[111] *Id.*

conspiracy charge, the Court remanded the case with instructions to allow the Government the opportunity to prove its case without the use of evidence "offensive to the Speech or Debate Clause."[112]

The Court in both *Kilbourn* and *Johnson* focused on the need to protect the independence of the legislature and gave the speech or debate clause a relatively expansive interpretation. In later cases, however, the Court has arguably cut back on the scope of the federal legislative privilege, focusing less on the need for legislative independence and more on the separation of powers concept which is the cornerstone of the American system of government. In *United States v. Brewster*,[113] for example, the Court stated:

> [A]lthough the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience, and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.[114]

Brewster involved the prosecution of a Congressman for accepting a bribe "in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity."[115] His indictment had been dismissed by the district court which held that the speech or debate clause, "particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*," protected the Congressman against "any prosecution for alleged bribery to perform a legislative act."[116]

The Supreme Court disagreed. It first considered the general question of whether Congressmen could be prosecuted for taking bribes in exchange for promises relating to legislative acts. It concluded that neither the speech or debate clause itself nor prior judicial interpretations of the clause indicated that such a prosecution was impermissible. *Johnson* made clear that Congressmen may be prosecuted for crimes "provided that the Government's case does not rely on legislative acts or the motivation for legislative acts."[117] Other cases taught that legislative acts include only "those things generally said or done in the House or Senate in the performance of official duties and . . . the motivation for those acts."[118] The Court distinguished sharply between these purely legislative activities and the "political" activities which Congressmen perform "in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections."[119] Although entirely "legitimate" and "appropriate," such activities, according to the Court, had never been protected by the speech or debate clause.

> In no case has this Court ever treated the Clause as protecting all conduct relating to the legislative process. In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.[120]

While a broader interpretation might be drawn out of the "flavor of the rhetoric and the sweep of the language" of prior decisions, neither the "precise words" nor the "sense of those cases" mandated such an interpretation.[121] The grant of privilege under the clause was extremely broad even when the clause was interpreted narrowly, and the Court refused to expand it.

> We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language,

[112] *Id.* On remand the Government did not pursue the conspiracy charge. Johnson was convicted on the conflict of interest count and his conviction was affirmed by the circuit court. 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).

[113] 408 U.S. 501 (1972).

[114] *Id.* at 508. (footnotes omitted).

[115] *Id.* at 502.

[116] *Id.* at 504.

[117] *Id.* at 512.

[118] *Id.*

[119] *Id.*

[120] *Id.* at 515–516. "Due functioning" of the legislative process has become the shorthand phrase for limiting the scope of legislative privilege to essentially voting, committee reports, hearings and speeches in Congress.

[121] *Id.* at 516.

and its history, to include all things in any way related to the legislative process.[122]

The fact that Congress itself had the power to punish its members for misconduct did not persuade the Court that the judiciary should leave that task solely within congressional hands. The Court felt Congress to be "ill-equipped" to handle the essentially judicial tasks of investigation, trial and punishment of wrongdoers.[123] Furthermore, if Congress actively attempted to police and punish its members for conduct not directly related to the legislative process, the Court felt that individual legislators would be "at the mercy of an almost unbridled discretion of the charging body that functions at once as accuser, prosecutor, judge and jury from whose decision there is no established right of review."[124] Independence of the legislature would be more likely to be compromised in such a situation than by a conventional criminal trial which provides rigorous procedural safeguards.

Finally, the Court was not convinced that the independence of the legislature was actually threatened by the potential for executive harassment through the initiation of prosecutions for bribery. Historically, "the check and balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose."[125] Public reaction to attempts to intimidate the legislature would limit the possibility of executive abuse of criminal statutes designed to assure honest government. But, even if some possibility of abuse existed, the Court felt it had to be balanced against the potential for harm to the system if Congressmen could not be prosecuted for bribery.

> The purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation.[126]

Having thus determined that prosecution for bribery was not forbidden simply because the charge "related" to the official conduct of a legislator, the Court went on to consider the specifics of the indictment brought against Brewster. It found that no inquiry into legislative acts was necessary in order for the Government to make out a prima facie case against the Congressman. The illegal act was the taking of a bribe, an act which could not possibly be characterized as legislative in nature. Furthermore, there was no need for the Government to show that Brewster had actually kept his promise to vote or to perform any other legislative act.

> To sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for paying the money is sufficient to carry the case to the jury.[127]

The Court dismissed with exceptional brevity the argument that *any* inquiry into an alleged bribe of a legislator for performing a legislative act was in essence an inquiry into the Congressman's motive and thus prohibited under *Johnson*.

> That argument misconstrues the concept of motivation for legislative acts. The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions. In *Johnson*, the Court held that, on remand, Johnson could be retried on the conspiracy-to-defraud count, so long as evidence concerning his speech on the House floor was not admitted. The Court's opinion plainly implies that had the Government chosen to retry Johnson on that count, he could not have obtained immunity from prosecution by asserting that the matter being inquired into was related to the motivation for his House speech.[128]

There were vigorous dissents in *Brewster*[129] and the case has been extensively criticized by

[122] *Id.*
[123] *Id.* at 518.
[124] *Id.* at 519.
[125] *Id.* at 523.
[126] *Id.* at 524.
[127] *Id.* at 527.
[128] *Id.* at 528. The Court was answering Justice Brennan, who dissented.
[129] *Id.* at 529 (Brennan, J., dissenting); *Id.* at 551 (White, J., dissenting). Justice Douglas joined both dissenting opinions.

commentators.[130] But the Court has not retreated. Although it continues to maintain that the clause will be read "broadly to effectuate its purposes," it has also continued in the cases subsequent to *Brewster* carefully to circumscribe the area of activity protected by the privilege. *Gravel v. United States*[131] is particularly on point.

In the *Gravel* case, Senator Gravel had read most of the "Pentagon Papers," which were classified government documents, into the Congressional Record during a special midnight sub-committee meeting. Rodberg, the Senator's aide, was subpoened to testify before the grand jury concerning arrangements being made by the Senator to have the papers republished privately. He was also to be questioned regarding the Senator's source for the classified documents. Rodberg challenged the subpoena and Senator Gravel intervened, claiming that requiring Rodberg to testify on these matters would violate his speech or debate privilege. The Court agreed with the Senator insofar as *he* claimed the speech or debate clause to protect *himself* against civil or criminal liability for things said or done at the sub-committee hearing. The Court further agreed with Gravel that his aide was privileged with regard to legislative acts which would have been privileged if the Senator had personally performed them. It noted that it was

> literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concerns constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.[132]

Thus it refused to take a "literalistic"[133] approach to the language of the speech or debate clause, which only mentions Senators and Representatives, and held the Senator's aide protected as well. But, in defining the scope of the Senator's privilege, and the commensurate privilege of his aide, the Court was considerably less willing to expand the literal words of the clause.

> Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House. Insofar as the Clause is construed to reach other matters, they must be an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[134]

It would not extend the privilege beyond "pure speech or debate" unless it was necessary to "prevent indirect impairment of such deliberations."[135] The Court did not think that private publication was essential to the business of the Senate. It was not a legislative act, and questioning on the matter would not violate the Senate's independence nor expose it to the threat of intimidation by the executive branch. Similarly, the Court felt the grand jury could question the aide on the Senator's source for the classified documents "as long as no legislative act was implicated by the questions."[136] "Rodberg's immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune."[137] It therefore remanded the case with instructions to fashion a protective order forbidding the questioning of Rodberg only to that extent.[138]

[130] *See, e.g.*, Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175 (1973); Comment, *Brewster, Gravel and Legislative Immunity*, 73 COLUM. L. REV. 125 (1973).

[131] 408 U.S. 606 (1972).

[132] *Id.* at 616-17 (citation omitted).

[133] *Id.* at 617.

[134] *Id.* at 625.

[135] *Id.*

[136] *Id.* at 628.

[137] *Id.*

[138] Another recent case which continues the limiting approach to the definition of legislative act is Doe v. McMillan, 412 U.S. 306 (1973). In *Doe*, suit was brought against members of Congress and the Public Printer and Superintendent of Documents for the publication of a libel in a congressional committee report which was distributed publicly. Members of the committee were immune from suit for the material included in their original report, since the making of the report was a legislative act. However, general publication and distribution of their report was not protected. Although the Court agreed that public dissemination of the information in congressional reports served an important function, it did not think such dissemination was an "integral part of the deliberative and communicative processes by which Mem-

The clear import of these federal speech or debate clause cases, taken together, is that the legislative privilege embodied in the clause is not without limit. While mindful of the English and colonial common law origin of the clause, the Court has always been careful to interpret it in light of its American constitutional context. Thus, although it has recognized that the privilege is one method by which the framers of the Constitution attempted to ensure effective separation of powers, it has also recognized that the clause cannot be read so as to allow one of the three co-equal branches to achieve supremacy over the other two. In making the necessary compromises between these competing considerations, the Court has at times perhaps drawn arbitrary or even inconsistent lines between protected and unprotected activity.[139] But implicit in all its decisions is the recognition of the fact that in spite of the complexities of the modern legislative process and in spite of the need for legislative independence, legislative privilege is necessarily limited by the general constitutional scheme of government.

Comparison of the Constitutional Privilege with the Doctrine of Official Immunity

Legislators are not the only officials who enjoy a privilege from suit for those things "said or done . . . in the exercise of the functions of [their] office."[140] Other governmental officials have a similar, though narrower, privilege under the common law doctrine of official immunity. The principal focus of the doctrine of official immunity is the need to protect the independence of government officials. The Supreme Court articulated the importance of the principle with regard to judges in *Bradley v. Fisher* in 1871:[141]

> [I]t is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to everyone who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful.[142]

Twenty-four years later, the Court made clear that the same reasoning applies to high ranking executive officials:

> We are of the opinion that the same general considerations of public policy and convenience which demand for judges of courts of superior jurisdiction immunity from civil suits for damages arising from acts done by them in the course of the performance of their judicial function, apply to a large extent to official communications made by heads of Executive Departments when engaged in the discharge of duties imposed upon them by law. The interests of the people require that due protection be accorded to them in respect of their official acts.[143]

More recently, in *Barr v. Matteo*,[144] the Court reiterated:

> [O]fficials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.[145]

The Court then expressly extended the concept of official immunity to protect lesser officials, noting that

> [t]he privilege is not a badge or emolument of exalted office, but an expression of a policy

bers participate in committee and House proceedings." *Id.* at 314.

> [W]e cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be.

Id. at 316. The Congressmen were immune from suit for the order of publication under the rationale of *Kilbourn*, but the printer who had carried out the unprotected order was held answerable for the libel.

[139] Numerous commentators have criticized the Court on this basis. *See, e.g.*, Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 59 VA. L. REV. 175 (1973); Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113 (1973); Comment, *Brewster, Gravel and Legislative Immunity*, 73 COLUM. L. REV. 125 (1973).

[140] *Coffin*, 4 Mass. at 27.

[141] 80 U.S. 335 (1871). The common law origin of this privilege for judges extends back to the time of Edward III. Scheuer v. Rhodes, 416 U.S. 232, 239 n.4 (1974).

[142] 80 U.S. at 347.

[143] Spalding v. Vilas, 161 U.S. 483, 498 (1896).

[144] 360 U.S. 564 (1959).

[145] *Id.* at 571.

> designed to aid in the effective functioning of government. The complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority as to many functions, and we cannot say that these functions become less important simply because they are exercised by officers of lower rank in the executive hierarchy.[146]

Although strikingly similar to the speech or debate privilege in this emphasis on the need for government officials to be independent, official immunity is narrower than speech or debate protection in two important ways: some officials enjoy only a qualified immunity, and regardless of whether the immunity is absolute or qualified, it protects the official only against civil actions. The immunity is granted in order to ensure that these officials can and will carry out their duties. It is limited in recognition of the fact that an absolute immunity for all officials in all situations is both unnecessary to achieve the purposes of immunity and intolerable in light of the great harm that can be done to individuals by officials who abuse their power. As a check against this abuse the privilege of some officials is "conditioned on the good faith of the actor and the purpose of his conduct."[147] In general, only those officials with considerable breadth of authority and discretion are protected by absolute immunity. Judges and high ranking executive officials, for example, as long as they act within the arguable bounds of their jurisdiction and authority, cannot be questioned with regard to their motivation for a particular act.[148] Members of school boards,[149] policemen,[150] and even governors,[151] on the other hand, must be acting in good faith[152] in order for their actions to be privileged.

[146] *Id.* at 572–73. States have long recognized official immunity for the actions of state and municipal governmental officials. *See, e.g.,* Mills v. Denny, 245 Iowa 584, 63 N.W.2d 222 (1954) (qualified immunity for mayor and city council members); Tanner v. Gault, 20 Ohio App. 243, 153 N.E. 124 (1925) (absolute privilege for county commissioners alleged to have slandered plaintiff); Bolton v. Walker, 197 Mich. 699, 164 N.W. 420 (1917) (absolute immunity to commission member testifying before tax commission); Ivie v. Minton, 75 Ore. 483, 147 P. 395 (1915) (qualified privilege for councilman testifying before council committee of which he was not a member); Weber v. Lane, 99 Mo. App. 69, 71 S.W. 1099 (1903) (qualified privilege of alderman to investigate complaint against citizen). State officials have also been held to retain their immunity when sued in federal court. *See, e.g.,* Wood v. Strickland, 420 U.S. 308 (1975) (qualified immunity for school board members sued under 42 U.S.C. § 1983); Scheuer v. Rhodes, 416 U.S. 232 (1974) (qualified immunity for governor and national guardsmen under § 1983); Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958) (qualified privilege of city council in passing ordinances); Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953) (qualified privilege of city council members for "acts done by them . . . in performance of their official duty as they understood it." *Id.* at 707 (Magruder, C. J., concurring).

[147] HARPER & JAMES, THE LAW OF TORTS, 294 n.2 (1956).

[148] With respect to judges this principle was established in Bradley v. Fisher, 80 U.S. 335, 347 (1871):

> Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry.

Id. at 372.

In Spalding v. Vilas, 161 U.S. 483, 498 (1896), the Court spelled out the purpose of the absolute immunity in detail:

> [I]t is clear . . . that [a high ranking executive officer] cannot be held liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress, and in respect of matters within his authority, by reason of any personal motive that might be alleged to have prompted his action; for personal motives cannot be imputed to duly authorized official conduct. In exercising the functions of his office, the head of an Executive Department, keeping within the limits of his authority, should not be under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint.

[149] Wood v. Strickland, 420 U.S. 308 (1975).

[150] Pierson v. Ray, 386 U.S. 547 (1967).

[151] Scheuer v. Rhodes, 416 U.S. 232 (1974).

[152] The good faith requirement contains both subjective and objective elements. In Wood v. Strickland, 420 U.S. 308, 321–22 (1975) the Court explained with respect to school board members that

> [t]he official . . . must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law. . . . than by the presence of actual malice. . . . [A] school board member . . . must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.

Good faith is not always a prerequisite to privilege for lesser officials when the charge is defamation and the official has been addressing himself to matters within his authority. *Compare* Shellburne Inc. v. New Castle County, 293 F. Supp. 237, 244 (D. Del. 1968) ("Members of lower legislative bodies [zoning board] . . .

With respect to criminal liability, official immunity provides no testimonial privilege, and officials may be held criminally liable for their conduct. Most courts have felt that the lack of an exemption from criminal liability will not interfere with the policy behind the doctrine of official immunity. As one court explained in answer to a United States Attorney's claim of immunity to a mail fraud charge:

> [C]ivil suits are easily adaptable for harassment purposes since any individual can institute a civil suit against another. . . . Without immunity, judicial officials who dissatisfy certain people might easily be plagued by a rash of civil suits predicated on their official conduct. . . . In contrast, this criminal prosecution was initiated by government officials in solemn performance of their duties and only after the defendants were indicted by a grand jury. Clearly, the potential for harassment . . . is not present in criminal prosecutions.[153]

Even judges, who enjoy exceptionally broad immunity, are not exempt from criminal liability. While it is still possible to find quotations to the effect that judges cannot be made criminally liable for their judicial acts,[154] it may be doubted that such a rule was ever uniformly followed. For instance, in *Braatelien v. United States*,[155] a judge was convicted of "conspiracy to defraud the United States by corruptly administering or procuring the corrupt administration of an Act of Congress."[156] Although the court noted that the crime charged was "distinct from his official acts"[157] and might have been "consummated without the performance of a single judicial act on his part"[158] the central core of the Government's case against the judge was the manner in which he conducted his judicial duties. Similarly, in *United States v. Manton*,[159] a criminal conspiracy conviction was upheld against a judge for his participation in a scheme under which he was paid to exercise his judicial power in favor of certain parties, without regard to the merits of their case. Evidence of his participation through his meetings with counsel, his scheduling of cases, the manner in which he presided at trial, and the fact that he rendered decisions in favor of defendants was all held admissible with no discussion of immunity.

More recently, in *O'Shea v. Littleton*,[160] the Supreme Court in strong dictum indicated that judges may be criminally liable for the exercise of their judicial duties in such a way as to wilfully deprive individuals of their constitutional rights. In *O'Shea*, suit was brought for injunctive relief against a state judge and magistrate alleged to be depriving plaintiffs, citizens of racially tense Cairo, Illinois, of their constitutional rights through discriminatory setting of bond, sentences, and jury fees in the criminal cases that came before them. Although refusing to grant the injunction,[161] the Court made special note of the fact that state officials, including judges, were subject to criminal penalties under federal law for willful discrimination that deprives a citizen of his constitutional rights.[162] In contrasting a judge's immunity from civil suit with his liability in criminal prosecutions, the Court observed: "the judicially fashioned doctrine of official immunity does not reach 'so far as to immunize criminal conduct proscribed by an Act of Congress'."[163] Although dictum, the words cannot be dismissed as insignificant. The Court was taking special note of the fact, and issuing a clear warning to all state officials, that the doctrine of official immunity does not afford protection against criminal prosecutions.

The doctrine of official immunity is not, of

usually have a qualified immunity for defamation.") *with* Tanner v. Gault, 20 Ohio App. 243, 245–46, 153 N.E. 124, 125 (1925) ("[T]here is a well-established general rule . . . that libelous or slanderous matter published in due course of legislative proceedings is absolutely privileged, and will not support an action, although made maliciously and with knowledge of falsity, if pertinent or relevant to matters under inquiry, and that this broad and comprehensive rule includes within its scope the proceedings of all legislative bodies, state or municipal.")

[153] United States v. Anzelmo, 319 F. Supp. 1106, 1118–19 (E.D. La. 1970) (citation omitted).

[154] *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 239 n.4 (1974) (quoting 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 235 (1927); 30 AM. JUR., JUDGES § 50 (1969).

[155] 147 F.2d 888, (8th Cir. 1945).

[156] *Id.* at 895.

[157] *Id.*

[158] *Id.*

[159] 107 F.2d 834 (2nd Cir. 1938).

[160] 414 U.S. 488 (1974).

[161] The Court refused to grant relief on grounds that plaintiffs had failed to present an actual case or controversy since none of them was actually threatened by the alleged discriminatory conduct of the state officials.

[162] 18 U.S.C. § 241 (1970) makes it a criminal offense to conspire to deprive a citizen of his constitutional rights.

[163] 414 U.S. at 503 (quoting *Gravel*, 408 U.S. at 627).

course, limited only to judicial and executive officials. It has frequently been applied to officials who act in a legislative capacity, such as municipal aldermen, county and regional commissioners, and members of other legislative or quasi-legislative boards.[164] But, because most state legislators have the protection of state constitutional speech or debate privilege, the concept of official immunity is rarely needed to guard their independence. In fact, one might assume that since immunity for legislators has so long been a part of the constitutional framework of American government, the doctrine of official immunity has been totally supplanted by the broader concept of speech or debate protection. Arguably, however, the doctrine of official immunity for legislators is still a viable alternative for determining the scope of a legislator's privilege in those situations in which a constitutional privilege is unavailable.

Recognition of a Federal Legislative Privilege Outside the Federal Constitutional Context

As noted earlier,[165] a federal common law legislative privilege could be formulated along lines exactly parallel to the speech or debate privilege of the federal constitution, or it could be patterned after the more limited privilege of official immunity.[166] The argument that the latter approach is more appropriate is predicated in part on a number of Supreme Court cases dealing with state legislators and legislatures. Not only do these cases themselves suggest that state legislators retain only official immunity when no specific constitutional provision protects them, but a comparison of the Court's approach and language in these cases with that in the speech or debate clause cases also leads to the same conclusion.

There is only one Supreme Court case, *Tenney v. Brandhove*,[167] which deals directly with the subject of legislative privilege outside the context of a suit against federal congressmen. The case is confusing because the source of the legislative privilege which the Court found applicable is never specifically identified. Tenney was chairman of a California state legislative committee. Brandhove, by means of a petition, attempted to convince the California legislature not to appropriate funds for the committee, charging that it had not only used him as a "tool" to smear a particular candidate for office, but had also conspired with the opposition candidate's campaign committee for the same purpose. The committee summoned Brandhove to testify and explain both his charges and certain conflicts with his previous testimony. Although Brandhove appeared before the committee, he refused to testify. He was prosecuted for contempt, but the prosecution was later dropped.[168] He then brought suit against the committee under §1983 of the Civil Rights Act,[169] alleging that the hearing to which he had been called to testify had not been held for any legislative purpose, but to "intimidate . . . silence . . . deter and prevent him from effectively exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances. . . ."[170] The Court of Appeals for the Ninth Circuit held that the complaint stated a cause of action, but the Supreme Court reversed. It treated the issue raised by the case as essentially one of statutory construction: "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National governments here?"[171]

The Court answered its own question in the negative. It reviewed in detail the development of the concept of legislative privilege in England and the United States, focusing principally on the importance of the privilege in protecting the independence of the legislature, and the widespread adoption of the privilege at the state level. Noting that legislative privilege was a "tradition . . . well grounded in history and reason," the Court was convinced that Congress, itself a staunch advocate of legislative freedom, did not mean to limit the right of legislators to act in their traditional legislative sphere by subjecting them to civil suits under the general language of §1983.[172]

[164] See citations in notes 146 & 152 *supra*.

[165] See text following note 52 *supra*.

[166] It is conceivable that a court could decide to recognize no privilege whatsoever. The likelihood of this appears so remote that it is not considered in this comment.

[167] 341 U.S. 367 (1951).

[168] The jury failed to return a verdict and the committee did not pursue the prosecution. *Id.* at 371.

[169] U.S.C. § 1983 (1970).

[170] 341 U.S. at 371.

[171] *Id.* at 376.

[172] *Id.* The Court has subsequently held that § 1983 does not abrogate the traditional immunity of other

The Court then considered whether the Tenney committee had been acting within a sphere of traditional legislative activity. It first noted that the fact that Chairman Tenney might have had an "unworthy purpose" in calling Brandhove before the committee would not destroy his legislative privilege.[173] The privilege would have no value if a legislator were subject to liability based on speculations as to his motives for a particular act. Motive was irrelevant as long as the legislator was acting within the traditional legislative sphere. Furthermore, in reviewing the actions of the Tenney committee, the Court noted that legislative investigations are "an established part of representative government,"[174] and on the facts before it there appeared to be substantial reason for the committee to have recalled Mr. Brandhove, regardless of the personal motives of the Chairman.

> Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and are as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may be fairly deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive. The present case does not present such a situation. Brandhove indicated that evidence previously given by him to the committee was false, and he raised serious charges concerning the work of a committee investigating a problem within legislative concern. The Committee was entitled to assert a right to call the plaintiff before it and examine him.[175]

Thus, the Court concluded, since the California legislators were "acting in a field where legislators traditionally have power to act,"[176] they were immune from suit under §1983.

At the time of the suit, the California constitution had no speech or debate privilege, and nowhere in the opinion does the Court suggest that the federal constitutional privilege was being applied to the state legislators. Therefore, it seems clear that the Court was adopting some sort of federal common law immunity to protect Tenney and his committee. What is far less clear, however, is whether the immunity applied was commensurate with the federal speech or debate privilege. Some support for the view that the *Tenney* privilege is equivalent to speech or debate protection is at least implied by the fact that the Court cites *Tenney* in most of the recent speech or debate clause cases in which the scope of the federal privilege is discussed.[177] The position is further strengthened by the Court's own words in *United States v. Johnson* that the *Tenney* Court "viewed the state legislative privilege [applied to Tenney] as being on a parity with the similar federal privilege. . . ."[178] However, despite the Court's references to *Tenney* in the federal speech or debate clause cases, a careful examination of the language of *Tenney* and of the Court's citations to the case both within and without the context of the speech or debate privilege strongly suggests that the protection granted Tenney was derived not from the constitutional protection afforded federal legislators but from the common law doctrine of official immunity.

First, it should be noted that the language of the *Tenney* Court does not determine the scope of the privilege applied. The catch phrase of the *Tenney* opinion was that the state legislators were immune from civil liability under §1983 for "acts done within their sphere of legislative activity."[179] These words are, of course, strik-

governmental officials. *See, e.g.*, Wood v. Strickland, 420 U.S. 308 (1975) (qualified immunity for school board members not abrogated); Scheuer v. Rhodes, 416 U.S. 232 (1973) (qualified immunity for governor and officials of national guard not abrogated); Pierson v. Ray, 386 U.S. 547, 554 (1967) (absolute immunity of judges and qualified immunity of police officers not abrogated).

[173] 341 U.S. at 377.

[174] *Id.*

[175] *Id.* at 377–78 (footnotes omitted).

[176] *Id.* at 379.

[177] *See, e.g., Gravel,* 408 U.S. at 624; *Brewster,* 408 U.S. at 514; *Johnson,* 383 U.S. at 179.

[178] 383 U.S. at 180. *See also,* Powell v. McCormack, 395 U.S. 486 (1969) in which the Court stated "This Court has on four occasions, Dombrowski v. Eastland, 387 U.S. 82 (1967); United States v. Johnson, 383 U.S. 169 (1966); Tenney v. Brandhove, 341 U.S. 367 (1951); and Kilbourn v. Thompson, 130 U.S. 168 (1881) been called upon to determine if allegedly unconstitutional action taken by legislators or legislative employees is insulated from judicial review by the Speech or Debate Clause." 395 U.S. at 501. *But see Brewster,* 408 U.S. at 516, n.10 in which the Court said *Tenney* was not a speech or debate clause case.

[179] 341 U.S. at 376.

ingly similar to those used by the Court in *Kilbourn* to hold that under the speech or debate clause federal Congressmen are immune from liability for "things generally done in a session of the House . . . in relation to the business before it."[180] They are also close to the words of the Court in *Johnson* and *Gravel*, both of which held that federal legislators could not be prosecuted for their "legislative acts."[181] However, the language of *Tenney* is also quite similar to that used by the Court to describe the scope of the doctrine of official immunity. For example, in *Bradley*, the Court found judges to be immune from liability "for acts done by them in the exercise of their judicial functions."[182] And, in *Spalding*, the Court held executive officials immune while "exercising the functions of [their] office . . . within the limits of [their] authority."[183] Thus, one must go beyond the language of the Court to determine the nature of the privilege it recognized.

The Government, in its brief before the three judge panel of the Seventh Circuit in the *Craig* case, suggested that *Tenney* must be viewed as an official immunity case because the Supreme Court has "aligned" *Tenney* with other official immunity cases.[184] For example, in *Pierson v. Ray*,[185] in which the Court held that §1983 did not abolish the common law official immunity of judges, the Court referred to *Tenney* in its discussion of common law immunities as if *Tenney* were a traditional common law immunity case.[186]

Similarly, in both *Wood v. Strickland*[187] and *Scheuer v. Rhodes*,[188] two cases involving the civil liability of state officials under §1983, the Court referred to *Tenney* in the course of its analysis of the official immunity limitations on §1983, without distinguishing the grant of immunity in *Tenney* as broader than that applied in suits against nonlegislative officials.[189] Finally, in *Doe v. McMillan*,[190] a case in which the Court had to deal specifically with the parameters of both the speech or debate privilege and official immunity, the court used *Tenney* only in its discussion of official immunity.[191]

One might argue, however, that even if the Court has "aligned" *Tenney* with its official immunity cases, such an alignment is not necessarily dispositive of the issue of a legislator's criminal liability. Official immunity is, after all, a flexible doctrine which varies in scope with the type of official involved. When applied to legislators it might, therefore, be broad enough to give them immunity from civil and criminal liability rather than just the traditional civil immunity granted to judicial and executive officials. Outside the constitutional context, where balance of power considerations must be given considerable weight, there is no apparent reason for granting such significantly broader immunity to legislators, however. The purpose of official immunity is to safeguard the independence of the official. That purpose is adequately served by limiting the possibility of civil suits. Criminal prosecutions, regardless of the official accused, simply do not provide the same "potential for harassment"[192] as civil suits.

In *O'Shea v. Littleton*,[193] the Supreme Court gave some indication that it not only recognizes an official immunity for state legislators which is different from speech or debate protection, but also that, at least for purposes of a federal criminal prosecution, it views all forms of official immunity as equal. *O'Shea*, it will be remembered, was a suit for injunctive relief against a state judge and magistrate in which the Court, albeit in dictum, went out of its way to warn that state officials may be criminally liable for exercise of their official duties in such

[180] 103 U.S. at 204.

[181] 408 U.S. at 619; 383 U.S. at 185.

[182] 80 U.S. at 347.

[183] 161 U.S. at 498.

[184] Brief for the United States at 18–21.

[185] 386 U.S. 547 (1967).

[186] The Court stated: "The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove* that the immunity of legislators for acts within the legislative role was not abolished." *Id.* at 554 (citation omitted).

[187] 420 U.S. 308 (1975).

[188] 416 U.S. 232 (1974).

[189] 420 U.S. at 316–21; 416 U.S. at 243–44.

[190] 412 U.S. 306 (1973). This case is also discussed in note 138 *supra*.

[191] In *Doe*, both a Congressman and the government printer were sued for publication of a libel in a committee report. The Court discussed the Congressman's immunity under the speech or debate clause. It dealt with the printer's immunity under the doctrine of official immunity. *Tenney* was cited only in the section of the case dealing with the printer's immunity. It was cited for three specific propositions: 1) "official immunity has been held applicable to officials of the Legislative Branch," 412 U.S. at 319 n.13; 2) the scope of the official immunity conferred is not the same for all officials, *id.* at 319; 3) the scope of immunity is tied to the range of official authority, *id.* at 320.

[192] United States v. Anzelmo, 319 F. Supp. at 1119.

[193] 414 U.S. 488 (1974).

a way as to violate federal law. Far from excepting legislators from this warning, the Court made specific reference to their potential liability:

> [W]hatever may be the case with respect to civil liability generally, or civil liability for willful corruption, we have never held that the performance of the duties of judicial, *legislative,* or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights.[194]

This statement that legislators are so liable stands in direct contrast to the holding of the Court in *Johnson* that under the federal speech or debate clause the legislative conduct of federal legislators cannot constitute either the basis for a criminal prosecution or evidence that a crime was committed. The implication seems clear—state legislators do not enjoy the same broad protection given federal legislators under the speech or debate clause.

If, as the above mentioned cases seem to indicate, *Tenney* merely recognized the traditional common law official immunity of legislators, why does the Court cite it in the speech or debate clause cases as if the privilege it extended were commensurate with the speech or debate privilege? There is no clear answer to this question. In some cases it appears that the Court simply cites *Tenney* inaccurately. For instance, in *Gravel,* the Court stated:

> Thus, voting by Members and committee reports are protected; and we recognize today— as the Court has recognized before, Kilbourn v. Thompson, 103 U.S. at 204; Tenney v. Brandhove, 341 U.S. 367, 377-378 (1951)— that a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.'[195]

Clearly neither *Kilbourn* nor *Tenney* said anything about criminal liability. *Tenney* was carefully limited to civil liability under §1983 and *Kilbourn* did not raise the issue of criminal prosecutions. The immunity of federal legislators under the federal clause from possible criminal liability for their legislative acts was not settled until *Johnson* was decided in 1966, and the *Johnson* court expressly noted that neither *Kilbourn* nor *Tenney* nor any other case "cast bright light on the question."[196]

In most of the speech or debate clause cases, however, the Court's use of *Tenney* can probably be best understood as a reference to a case in which the Court has treated analogous, but not identical, issues. Official immunity and speech or debate privilege overlap a great deal. If the Court has not adequately distinguished between the two in the speech or debate clause cases it is probably because on the particular facts of the case such a distinction was simply not crucial. Since official immunity in its broadest form is narrower than speech or debate immunity, the protection recognized under the former would clearly be recognized under the latter. Thus, in the context of the speech or debate cases, there is normally no need meticulously to distinguish *Tenney* as recognizing only the narrower immunity. The language of *Tenney* is directly and easily transferable to discussions of speech or debate protection.[197]

Bond v. Floyd,[198] a case which does not even mention *Tenney,* also helps support the argument that the Court does not view the privilege granted the legislators in *Tenney* as the equivalent of speech or debate protection. Julian Bond was elected to the Georgia legislature for a special one year term to commence in January 1966.[199] Because of certain statements he had made about the conduct of the Vietnam War,[200] the Georgia House, after a hearing at which Bond testified, concluded that he could not honestly take either the oath of office required by the Georgia constitution or the oath to support the Constitution of the United States. The clerk refused to administer either oath and the House refused to seat him. Bond sued for in-

[194] *Id.* at 503 (emphasis added) (citations omitted).
[195] 408 U.S. at 624.
[196] 383 U.S. at 180.
[197] Similarly, since on the facts the Tenney committee's conduct was protected under the narrowest view of official immunity (the committee was clearly engaged in legislative business and there was ample evidence of a legislative purpose in recalling Brandhove to explain his prior testimony), there was no need to distinguish between any broader speech or debate privilege and the doctrine of official immunity.
[198] 385 U.S. 116 (1966).
[199] He was subsequently re-elected in a special election held to fill the vacancy caused by the House's refusal to seat him. He was re-elected in the regular November, 1966 election as well. *Id.* at 128.
[200] The statements are reproduced in the Court's opinion. *Id.* at 121-22.

junctive relief under §1983[201] against the speaker and speaker pro-tem, certain officers of the House, and several members as representatives of the membership of the entire body.

The state argued that the Georgia constitution specified the qualifications for the office of state legislator, that the oath provisions constituted part of those qualifications, and that the House had the power to "look beyond the plain meaning of the oath provisions . . . to [determine] whether a given Representative may take the oath with sincerity."[202] Although admitting that it could not exclude a duly elected representative on racial or other clearly unconstitutional grounds, the state argued that the oath requirement was not unconstitutional and, therefore, "there should be no judicial review of the legislature's power to judge whether a prospective member may conscientiously take the oath required by the State and Federal Constitutions."[203] Bond, on the other hand, maintained that the judgment of the House that he could not honestly take the oaths of office violated his first amendment rights.

The Supreme Court agreed that the legislature had infringed Bond's right to free speech:

> [W]e do not quarrel with the State's contention that the oath provisions of the United States and Georgia Constitutions do not violate the First Amendment. But this requirement does not authorize a majority of state legislators to test the sincerity with which another duly elected legislator can swear to uphold the Constitution.[204]

Bond's statements did not violate any law. Although the state could require an oath of loyalty, that oath could not be used to "[limit] its legislators' capacity to discuss their views of local or national policy."[205]

Nowhere in the opinion did the Court mention the holding of *Tenney* that under §1983 Congress did not extinguish the immunity of legislators acting in their traditional sphere of legislative activity. Nor did it distinguish the two cases on the basis that Brandhove had sued for damages and Bond was asking for injunctive relief. It did not mention *Tenney* at all. Nor did it discuss whether state legislative functionaries, such as the clerk of the Georgia House, might be sued although members of the House themselves could not. In short, the Court did not suggest that a state legislator sued under federal laws had any sort of speech or debate protection.

This disposition of *Bond* is simply inexplicable if the Court conceives of *Tenney* as affording state legislators a privilege commensurate with speech or debate protection. At the federal level such a suit clearly cannot be maintained. In *Powell v. McCormack,*[206] the Court explicitly so held. Congressman Powell, although duly elected and meeting all the qualifications for the office of Representative, was not permitted to take the oath of office pending a House committee investigation into certain of his activities. After its investigation the committee recommended that Powell be seated as a Member, but censured. The full House, however, voted to exclude him from membership. Powell then brought suit for injunctive and declaratory relief against the Speaker, Clerk, Sergeant-at-Arms, Doorkeeper, and certain named Members of the entire House.[207] The Court immediately dismissed the action against the Congressmen as violative of their speech or debate privilege. The action was allowed to proceed, however, against the House employees.[208]

Of course, *Powell* was decided after *Bond,* but for purposes of this discussion, the timing of the two cases is largely irrelevant. The distinction between a suit against employees of the House and Members of the House themselves which the *Powell* Court recognized and which the *Bond* Court did not even mention, was established as early as 1881 in *Kilbourn,* and that same distinction was reaffirmed in *Tenney.*[209] If *Tenney* held that state legislators are protected by an immunity based on the speech or debate clause, the *Bond* Court certainly would have been bound to deal with the distinction. Thus,

[201] Also 28 U.S.C. §§ 1331, 1343(3), 1343(4), 2201, and 42 U.S.C. § 1971(d), 1988 (1970).

[202] 385 U.S. at 130.

[203] *Id.* at 131.

[204] *Id.* at 132.

[205] *Id.* at 135.

[206] 395 U.S. 486 (1969).

[207] Although the Congress which had excluded him had ended and a new Congress was in session, the Court held that Powell's claim for back salary prevented the case from being moot. *Id.* at 500.

[208] *Id.* at 504–06. As in *Kilbourn,* the Court left for future decision the question of whether suit could be maintained against the Congressmen if no other remedy was available and no House employee had participated in the action with the Congressmen. *Id.* at 506 n.26.

[209] 341 U.S. at 378.

by totally ignoring the question of the immunity of the Georgia legislators, the Court implicitly indicated that whatever legislative privilege state legislators enjoy in federal court, it is considerably more limited than speech or debate protection.

Another indication that *Bond* may be cited for such a proposition is the failure of the *Powell* Court to distinguish or even mention *Bond* in connection with the question of legislative privilege. Since it cited *Bond* in regard to other matters,[210] the Court was clearly aware of the disposition of the case. Yet obviously it felt no need to explain why a suit against the members of the Georgia legislature was allowable and suit against the Members of the federal Congress was not. The most probable reason for this lack of even an explanatory footnote is simply that the Court saw no conflict between the two cases because the privilege of state legislators is not commensurate with speech or debate privilege.[211]

Jordan v. Hutchenson,[212] a Fourth Circuit case decided prior to *Bond,* explicitly holds that the immunity of state legislators is more limited than the speech or debate protection given federal legislators. In *Jordan,* plaintiffs alleged that a committee of the Virginia legislature was acting as part of a conspiracy of all elected officials in the state to "intimidate, discourage and impede the plaintiffs and all Negro citizens of Virginia from using the courts as a means of ending the practices of racial segregation in that state."[213] They sought an order requiring the prosecution of two of the named defendants under 18 U.S.C. §§241 and 242,[214] and an injunction prohibiting the investigatory activity of the committee. Holding that the plaintiffs had stated a cause of action, the court noted:

> Although the federal courts will recognize and respect the state's right to exercise through its legislature broad investigatory powers, nevertheless these powers are not unlimited and it remains the duty of the federal courts to protect the individual's constitutional rights from invasion either by state action or under color thereof. Especially is this true in the sensitive areas of First Amendment rights and racial discrimination. Where there exists the clear possibility of an immediate and irreparable injury to such rights by state legislative action the federal courts have exercised their equitable powers including . . . injunction.[215]

The court rejected the defendants' argument that *Tenney* indicated immunity from suit: "That case holds that legislators when acting within the scope of their authority are not liable for *money damages,* notwithstanding their conduct may have been motivated by personal spite or vindictiveness."[216] It was not applicable to a case in which injunctive relief was asked in order to protect federal rights. In such a case, according to the court, the federal courts have the power to review the actions of the legislature and to grant appropriate relief. That power cannot be limited by a claim of legislative privilege.

Of course the Supreme Court has never been as explicit as the Fourth Circuit on this issue. But the fact that it has granted injunctive relief against state legislatures and their members with no discussion of legislative privilege when legislative privilege stands out as a crucial issue

[210] *Bond* was cited in reference to the claim of mootness. 395 U.S. at 499.

[211] Another case which illustrates the difference in the Court's treatment of federal legislators is Eastland v. United States' Servicemen's Funds, 421 U.S. 491 (1975). In *Eastland* the Court refused to quash a subpoena issued by a congressional committee investigating a servicemen's club, although the members argued that compliance with the subpoena would violate their first amendment rights. The Court found the actions of the committee and its members immune from judicial interference because of the speech or debate clause. Analysis of the speech or debate privilege was central to the Court's decision. Compare not only *Bond,* but also Denny v. Bush, 367 U.S. 908 (1961) *aff'g per curiam* Bush, Orleans Parish School Board, 191 F.Supp. 871 (E.D.La. 1961). In *Denny* the Court affirmed with no discussion of legislative privilege, the lower court injunction against a state legislature attempting to evade court ordered desegregation.

[212] 323 F.2d 597 (4th Cir. 1963).

[213] *Id.* at 599. The Virginia legislature had attempted to expand the coverage of its laws against champerty, barratry and maintenance to include the activities of civil rights organizations within the state. The particular committee cited in *Jordan* was originally established to oversee "the laws of the Commonwealth relating to the administration of justice . . . particularly those relating to the statutorily redefined offenses of champerty, maintenance, etc. . . . " *Id.* at 602. Its activities were later expanded to cover legal ethics and the unauthorized practice of law. Plaintiffs alleged that the committee by use of its investigatory power was interfering with their efforts as lawyers to eliminate segregation.

[214] 18 U.S.C. §§ 241, 242 (1970).

[215] 323 F.2d at 601.

[216] *Id.* at 602.

in similar cases at the federal congressional level is a strong indication that the Court does not recognize a similar privilege at both levels.

Conclusion

A Brief Return to the Craig Opinion

The dilemma facing the Seventh Circuit in *Craig* was to determine from both the history of legislative privilege and the relevant Supreme Court decisions whether state legislators accused of violating federal criminal laws enjoy some form of federal common law privilege. Obviously, neither history nor Supreme Court decisions provide clear guidance, and more than one conclusion can be, and was, drawn from the same source material. However, the decision of the full court[217] seems to reflect more accurately both the history of legislative privilege and the principles articulated by the Supreme Court than does the earlier panel decision.

The principal difference between the panel majority and the full court majority opinions is one of emphasis. The panel majority relied almost exclusively on the broad language of the speech or debate clause cases, and it stressed the need for legislative independence at all levels of government. It argued that in a government of limited powers—with those powers not specifically granted the federal government reserved to the states under the tenth amendment—the states had an essential role to play in the operation of the governmental system. Fearing that the independence of the state legislatures would be compromised if the federal government could threaten state legislators with criminal liability for their legislative acts, the panel considered a broad legislative privilege, equivalent to the speech or debate clause, to be necessary in order to eliminate that potential threat.

The problem with the panel's singular emphasis on independence is that it ignores both the implications of the supremacy clause and the separation of powers function served by the speech or debate clause at the federal level. The concept of legislative privilege developed as a consequence of the competition for power between the executive and legislative sections of government. In England, it arose in the battle for supremacy between the Crown and Parliament. In the United States, the principle was adapted to ensure the separation and balance of power between two equal and clearly competing branches of the federal government. In both cases it was principally the power of the competing executive branch that the privilege was designed to curb.

Within any federal system there is, of course, potential for competition between the separate levels of government, just as various branches at the same level may compete for power. But under the Constitution when authority is specifically delegated to the federal government, the supremacy clause resolves the issue of competition for power. Concern for the independence of a state legislature, on the other hand, involves the relationship within the state government between legislative and executive branches, a tension properly controlled by state speech or debate privileges. Therefore, the question that should be asked in federal prosecutions of state legislators is not whether the independence of a state legislature may in some way be affected, but whether the federal government has the authority to act. Whatever questions may once have been raised with respect to the federal government's authority to act in matters of criminal law enforcement, that federal power is now clearly established under the commerce clause[218] and other explicit grants of authority such as the power to establish the post office.[219] Both the Hobbs Act and the Mail Fraud Statute under which the legislators in *Craig* were prosecuted have been specifically upheld against constitutional attack.[220]

[217] All references to the full court decision in this section specifically emcompass both Judge Tone's concurrence in the panel decision and the full court opinion on rehearing. The latter essentially adopted the former.

[218] Cases upholding the power of the federal government to define and punish criminal activity under pthe commerce clause, in conjunction with the necessary and proper clause are numerous. For broad interpretation of the reach of this power, *see* Perez v. United States, 402 U.S. 146 (1971) in which the Court upheld the constitutionality of a congressional statute directed at "loan sharking" activities over the vigorous dissent of Justice Stewart who maintained that the crime was purely local in nature and not within the power of the federal government to punish.

[219] For a discussion of the federal power under this clause, *see* Cushman, *National Police Power under the Postal Clause of the Constitution*, 4 MINN. L. REV. 402 (1920).

[220] *See, e.g.*, United States v. Staszcuk, 517 F.2d 53 (1975) (Hobbs Act); United States v. Mirabelle, 503 F.2d (1065, 8th Cir. 1974) (mail fraud).

Both these statutes have also been construed to reach the illegal activities of state officials,[221] and there is no reason why the activities of state legislators alone should be exempted.

In contrast to the panel decision, the full court decision in *Craig* focuses not only on the separation of powers function of the speech or debate privilege, but also on the limitations of both that privilege and the doctrine of official immunity. It implicitly recognizes that independence is not the sole factor to be considered in determining the nature of a legislator's privilege. Almost all government officials enjoy some sort of privilege from suit premised on their need for independence in order to carry out their duties. But not all officials are equally immune. The differences in protection are related both to the nature of the particular official's job and to the requirements of the constitutional system, requirements which vary when the issue is not intra-federal power, but federal-state relations.

The full court opinion also reveals a more cautious attitude toward the creation of federal common law privileges. Its tone recalls Wigmore's reflections on the public's right to "everyman's evidence."[222]

> The investigation of truth and the enforcement of testimonial duty demand the restriction, not the expansion, of . . . privileges. They should be recognized only within the narrowest limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice.[223]

This same philosophy is implicit in the decisions of the Supreme Court dealing with legislative privilege, if one considers the entire spectrum of cases in which the Court has dealt, directly or indirectly, with the issue. The Court has not extended the privilege "beyond its intended scope."[224] Where there is no real necessity for an expansive interpretation of privilege, none has been given. Similarly, the final decision of the court in *Craig* recognizes that in the context of federal criminal prosecutions of state legislators there is no necessity for an expansive interpretation of legislative privilege, and none should be given.

[221] *See, e.g.,* United States v. Kuta, 518 F.2d 947 (7th Cir. 1975) (alderman charged under Hobbs Act); United States v. Price, 507 F.2d 1349 (4th Cir. 1974) (chairman of county council charged under Hobbs Act); Shusan v. United States, 117 F.2d 110 (1941) (member of board of commissioners charged under mail fraud statute).

[222] 8 WIGMORE EVIDENCE § 2192 (Mc Naughten rev. 1961).

[223] *Id.*

[224] *Brewster*, 408 U.S. at 516.

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THE RIGHT OF AUTONOMY: CONSTITUTIONAL LIMIT TO PLENARY FEDERAL POWER

As every United States citizen ought surely to be aware, government in this country functions through two entities, the state and federal governments. Since these institutions are by definition separate forms, resisting ready integration, those regions where they interface have been in continuous flux from before the birth of the Constitution.[1] The struggle between them has resulted in a steady erosion of the position of the state vis-a-vis the national government as an independent political body.[2] Indeed, since the beginning of the Republic, an erratic but steady decline in the power of the states has been recognized by the courts.[3] So complete is this decline that the classic expression of the structure of state-national relations, the tenth amendment, has been shorn of all substance and called a mere "truism".[4] Yet, to consider the shift of power as ended save for the eventual dismantlement of state governmental machinery, is to overlook both the vitality of the Constitution as a source of preservation of state independence and the ability of the Supreme Court to invigorate it. While the struggle for power has long since been decided, there now remains the need to deal with the state's right to autonomy[5] upon which the Constitution was based and which is becoming increasingly explicit in the decisions of the Supreme Court.

I. HISTORY OF STATE-NATIONAL CONFRONTATION OVER POWER

While the tenth amendment is not the only marker in the Constitution concerning the relationship of state and national power, with rare exceptions[6] its language has provided the paradigm of judicial analysis. Assuming that power was reserved to the states or people unless a delegation by either of those groups could be found in the Constitution,[7] the crucial question, traditionally, was one of defining the word "power".

Following the adoption of the Constitution, it took only thirty years of constitutional interpretation before the potential of national power was exponentially increased. While the Articles of Confederation had limited the national government solely to its "express powers,"[8] the Constitution of 1789 contained no such limiting

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[1] *See* remarks of Messrs. Patterson, Lansing, Randolph, and Hamilton, J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 118-39 (1966).

[2] Kurland, *Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of Government*, 78 HARV. LAW REV. 143,144 (1964) (hereinafter cited as Kurland).

[3] Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), where the Supreme Court found that the Constitution had shorn the states of sovereign immunity from suit and a state could thus be sued by its citizens.

[4] "The Amendment [the Tenth] states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100,112 (1941). The tenth amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[5] The labeling of this right as one of autonomy was arbitrarily selected by the author to express the nature of the purpose which it serves in the federal system. The word was used in a related context by Justice Field in *Ex parte* Virginia:

> Nothing, in my judgment, could have a greater tendency to destroy the independence and autonomy of the States . . . than the doctrine asserted in this case, that Congress can exercise coercive authority over judicial officers of the State in the discharge of their duties under State laws.

100 U.S. 339, 358 (1879) (Field, J., dissenting).

[6] For example, Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819), concerned the contract clause, art. I, § 10.

[7] One commentator has interpreted the tenth amendment to mean:

> The States of course possess every power that government has ever anywhere exercised, except only those powers which their own constitutions or the Constitution of the United States explicitly or by plain inference withhold. They are the ordinary governments of the country; the federal government is its instrument only for particular purposes.

W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 184 (1908).

[8] Article II of the Articles of Confederation stated: Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this conference expressly delegated to the United States, in Congress assembled.

language. *McCulloch v. Maryland*[9] extended the definition of "power" to include those powers reasonably implied via the necessary and proper clause of the Constitution.[10] Loss of power by the states during this period primarily concerned those powers outgoing in nature; that is, powers which extended or had the potential to expand a state's impact beyond its boundaries. Thus, *McCulloch* circumscribed the state's power to tax. Five years later, in *Gibbons v. Ogden*,[11] the federal commerce power[12] was sufficient to invalidate a state's attempt to exercise its police power, the classic pre-emption case.[13] Control of slavery, insofar as it was a question of citizenship, was found to be beyond the power of the states to inhibit.[14]

These pre-Civil War decisions expanded federal power at the expense of the state, but only insofar as the state partook of activities that might interfere with those which had been delegated to the national government. Within their own realm, the states remained independent.[15]

While the Civil War answered whether the Constitution was a dissolvable compact, its progeny—the thirteenth, fourteenth, and fifteenth amendments—posed grave questions as to the ordering of power between the state and national governments. Now the federal government became the guarantor of certain rights of the people against state government intrusion or interference. Unquestionably, federal power had been expanded at the cost of the states.[16] What remained to be determined was how far that expansion reached *into* the states.[17]

Also during this period, the power of the state to affect outgoing enterprises and rights continued to be scrutinized and regulated. The classic example of the reach of federal power is that which traces interstate commerce. While early restrictive distinctions denied the application of federal power to private actions,[18] the restrictions proved to be little more than bothersome delaying actions, only postponing federal action. State power as a bar proved to be a more effective limitation. *Hammer v. Dagenhart*[19] and the decisions which found various New Deal acts unconstitutional[20] emphasized the continuing belief that there existed substantive powers retained by the states which could defeat otherwise legitimate national actions.

The respective reach of national and state taxing powers continued to be a field of uncertain bounds. In *Dobbins v. Commissioners of Erie County*,[21] following *McCulloch*, the states were found to be incompetent to tax the salary of a federal official. Conversely, in *Collector v. Day*,[22] the national government was denied the right to tax the salary of a state judicial officer. Yet, in *South Carolina v. United States*,[23] the national government was found to be capable of taxing certain functions which the state had assumed in the exercise of its police power. The symmetrical nature of the tax system was breaking down, as the needs of the national government began to take precedence.

[9] 17 U.S. (4 Wheat.) 316 (1819). In *McCulloch*, the Supreme Court found the states to be incapable under the Constitution to tax property owned by the national government.

[10] Congress shall have Power . . . to make all Laws which shall be necessary and proper for the carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.
U.S. CONST. art I, § 8.

[11] 22 U.S. (9 Wheat.) 1 (1824).

[12] U.S. CONST. art. I, § 8, cl. 3.

[13] *See* Comment, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

[14] *See* Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842), where a Pennsylvania statute making illegal the willful taking of people out of the state to enslave them was found to be unconstitutional. *See also*, Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

[15] The powers exclusively given to the federal government are limitations upon state authorities. But, with the exception of these limitations, the states are supreme; and their sovereignty can be no more invaded by the action of the general government, than the action of the state governments can arrest or obstruct the course of the national power.
Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 570 (1832).

[16] "They [the XIII, XIV, and XV Amendments] were intended to be, what they really are, limitations of the power of the States and enlargements of the power of the Congress." *Ex parte* Virginia, 100 U.S. 339, 345 (1879).

[17] The Fourteenth Amendment withdrew from the States powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise.
Twining v. New Jersey, 211 U.S. 78, 92 (1908).

[18] *See, e.g*, United States v. E. C. Knight, 156 U.S. 1 (1895).

[19] 247 U.S. 251 (1918).

[20] Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936); Schecter Poultry v. United States, 295 U.S. 495 (1935).

[21] 41 U.S. (16 Pet.) 435 (1842).

[22] 78 U.S. (11 Wall.) 113 (1870).

[23] 199 U.S. 437 (1905).

As to those powers and prerogatives of the state which were internal in application, primarily the police power and its concern for the health and safety of its citizens, the entry offered to the national government by the Civil War Amendments was bitterly fought and restrictively perceived. While the Supreme Court in *The Slaughterhouse Cases*[24] recognized the goals and reasoning of those amendments, it refused to invigorate them.[25] Indeed, in those rare instances where the Court did act,[26] the outcry was loud and fierce. Similarly, attempts to reach the criminal systems of the states via incorporation of the provisions of the Bill of Rights into the fourteenth amendment due process provision were soundly defeated. When the electric chair was first introduced, attempts were made to attack it as a cruel and unusual punishment. The Court rejected such an approach, holding that:

> The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people.[27]

An attempt to incorporate the right against self-incrimination reached a like fate.[28] Indeed, in *South Carolina v. United States*,[29] the Court went so far as to limit the federal power to intervene within a state to the provisions of a single constitutional clause,

> [t]he Constitution provides that "the United States shall guarantee to every State in this Union a republican form of government," Art. IV, sec. 4. That expresses the full limit of National control over the internal affairs of a State.[30]

The last significant attempt to reject the expanded constitutional power of the national government came with the "infamous"[31] striking down of a dozen pieces of New Deal legislation. That process came abruptly to an end in 1937, however, and the question of the distribution of power between the federal and state governments began to be resolved.

The substantive impact of the tenth amendment did not long survive the Court's turnabout. By 1941, the amendment reached "truism" status,[32] as the Supreme Court finally decided that a plenary power of the national government could not be buffered or moderated by any powers inherent in the states.[33] There were no such powers.

The Supreme Court for the first time intruded in a state criminal proceeding in *Powell v. Alabama*.[34] The states' ability to mold and determine their own criminal procedure began to erode at a quickening pace in the years that followed. The same day that an attempt to extend the fourth amendment exclusionary rule to the states was defeated,[35] a confession accepted by a state supreme court[36] was thrown out by the United States Supreme Court as being coercively obtained in violation of the due process provision of the fourteenth amendment.[37] As state criminal proceedings became more encumbered with federal rights to protect, they became more subject to federal review as to those rights.[38]

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[24] 83 U.S. (16 Wall.) 36 (1873).

[25] The dissent clearly acknowledged the course the future would eventually take:

> It [the power via the war amendments] is necessary to enable the government of the Nation to secure everyone within its jurisdiction the rights and privileges enumerated, which, according to the plainest considerations of reason and justice and the fundamental principles of the social compact, all are entitled to enjoy. Without such authority any government claiming to be national is glaringly defective.

83 U.S. (16 Wall.) 129 (Swayne, J., dissenting).

[26] *Ex parte* Virginia, 100 U.S. 339 (1879). Virginia had a statute requiring its judges to venire only responsible men. One state judge had used this formulation to eliminate all blacks. In this case, the Supreme Court upheld federal intervention.

[27] *In re* Kemmler, 136 U.S. 436, 448 (1890).

[28] Twining v. New Jersey, 211 U.S. 78 (1908).

[29] 199 U.S. 437 (1905).

[30] *Id.* at 454. If strictly adhered to, this would have effectively removed state action from judicial oversight since the Court had held previously that art. IV, § 4 was directed not to the judiciary, but, rather, the Congress. Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[31] *See* Blaustein & Mersky, *Rating Supreme Court Justices*, 58 A.B.A. J. 1183, 1186 (1972).

[32] *See* note 4 *supra*.

[33] Wickard v. Filburn, 317 U.S. 111 (1942).

[34] 287 U.S. 45 (1932). The Court found that the failure of the trial court to appoint counsel for the defendant in a capital case was a violation of due process as required by the fourteenth amendment.

[35] Wolf v. Colorado, 338 U.S. 25 (1949).

[36] Watts v. State, 226 Ind. 655, 82 N.E.2d 846 (1948).

[37] Watts v. Indiana, 338 U.S. 49 (1949).

[38] The decision in Frank v. Mangum, 237 U.S. 309 (1915), first opened federal courts for habeas corpus review of state actions in limited circumstances. These circumstances were progressively broadened

The Warren Court ended judicial hesitation in applying provisions of the Bill of Rights to state criminal proceedings through the fourteenth amendment. The exclusionary rule concerning evidence obtained from searches and seizures illegal under the fourth amendment was applied to the states in 1961.[39] The provisions of the fifth amendment (prohibition against double jeopardy[40] and privilege against self-incrimination[41]) and the sixth amendment (right to a speedy trial,[42] right to counsel,[43] right to a jury trial for a criminal prosecution[44] and the right to confront witnesses[45]), as well as the derivative protections of *Miranda v. Arizona*,[46] were held to apply to the states.

The Court has gone beyond the state's criminal processes and has extended federal power to reach the state's power to educate its citizens,[47] provide recreation,[48] establish political subdivisions[49] and even constitute its own legislature.[50] These extensions, however, were not based on the plenary power of the federal government but on the oversight responsibilities given it by the Civil War Amendments.

As more and more constitutional safeguards were being grafted onto the state criminal process, there arose the notion that these rights required a federal forum of review to ensure their exercise and enforcement.[51] The basic rationale was that a federal right was being contested and that the states, which had been reluctant to introduce these safeguards without a constitutional mandate, would not be reliable in ensuring their proper breadth. The result was the judicial extension of habeas corpus review in federal court of state court constitutional determinations.[52]

The internal structure of the state had likewise always been free from federal oversight. Judicial attacks based on the Guarantee Clause of the Constitution[53] were rebuffed on the premise that the power to carry out the guarantee of the section was legislative in nature.[54] This all changed in 1962, when *Baker v. Carr*[55] held the principle of "one man-one vote" applicable to the apportionment of state legislatures through the Equal Protection Clause of the fourteenth amendment.[56] Three years later, federal mandates concerning procedures to be followed in the registration of the electorate by the states were upheld by the Supreme Court in *Louisiana v. United States*[57] and *South Carolina v. Katzenbach*.[58] Indeed, the oversight processes validated in *Katzenbach* relegated the state to the status of a mere administrative unit of the national government for purposes of voter registration, as the ministerial control of the United States Justice Department was broad in scope, scrupulous in detail, and affirmative in nature.

These decisions mark the highwater crest of national manipulation of state institutions. To a large extent, the intrusion of federal policy and power into these reaches was a response to the inability of the state institutions to shift as quickly as national expectations.[59] The result was an abiding distrust in the competence of the states to act as they "ought" and the destruc-

in Brown v. Allen, 344 U.S. 391 (1953), Fay v. Noia, 372 U.S. 391 (1963), and Kaufman v. United States, 394 U.S. 217 (1969). *But, see* Stone v. Powell, 428 U.S. 465 (1976). *See also,* text accompanying notes 116–18 *infra*.

[39] Mapp v. Ohio, 367 U.S. 643 (1961).

[40] Benton v. Maryland, 395 U.S. 784 (1969). *See also*, Ashe v. Swenson, 397 U.S. 436 (1970).

[41] Malloy v. Hogan, 378 U.S. 1 (1964).

[42] Klopfer v. North Carolina, 386 U.S. 213 (1967).

[43] The right was first extended to indigent felony defendants in Gideon v. Wainwright, 372 U.S. 335 (1963), and to indigent misdemeanor defendants subject to incarceration in Argersinger v. Hamlin, 407 U.S. 25 (1972).

[44] Bloom v. Illinois, 391 U.S. 194 (1968).

[45] Pointer v. Texas, 380 U.S. 400 (1965).

[46] 384 U.S. 436 (1966). *See generally*, Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59 (1966).

[47] Brown v. Board of Education, 347 U.S. 483 (1954).

[48] Evans v. Newton, 382 U.S. 296 (1966); Gilmore v. City of Montgomery, 417 U.S. 556 (1974).

[49] Gomillion v. Lightfoot, 364 U.S. 339 (1960).

[50] Baker v. Carr, 369 U.S. 186 (1962).

[51] Younger v. Harris, 401 U.S. 37, 58 (1971).

[52] *See* note 38 *supra*.

[53] "The United States shall guarantee to every State in this Union a Republican Form of Government." U.S. CONST. art. IV, § 4.

[54] Highland Farms Dairy v. Agnew, 300 U.S. 608 (1937).

[55] 369 U.S. 186 (1962).

[56] The principle ultimately was extended to Congressional districts. The very nature of the Senate precluded application of such a formula to Senate elections. For the Senate was not designed to be representative of the population, but it was to represent the equal sovereignty of the states. *See* THE FEDERALIST No. 62 (A. Hamilton).

[57] 380 U.S. 145 (1965).

[58] 383 U.S. 301 (1966).

[59] Kurland, *The Supreme Court and the Attrition of State Power*, 10 STAN. L. REV. 274, 282–283 (1958).

tion of the ability of the states to develop their own ordering of priorities.[60] The powers relating to sovereignty—all the power which made an institution a state—have thus come to lodge within the national government. The states, lacking all effective substantive power, can be seen as mere political sub-units of the national government. If transformation of the *federal* national government into a *unitary* national government has not yet occurred, the reason is not lack of power, but lack of need or desire to exercise that power.[61]

There is no longer any struggle between the state and national governments as to where the powers lie. The delegated powers of the federal government have become the functional equivalent of *all* the powers:

> There are today few, if any, governmental functions performed by the states that are not subject either to the direct control of the national government or to the possibility of preemption by the national government. The concept of separate sovereignties within this country is largely a matter of history.[62]

Thus, between the final recognition and acceptance of the plenary nature of the delegated powers of the national government[63] and the ability of the national government to set standards and conditions to which the state governments must conform, the states as institutions have become superfluous without a visible change in the document which they caused to have established in the first instance. There exists the existential dilemma of the states: all effective power having passed from them; what is the meaning and purpose of their existence?

II. Perceptions of Autonomy

The judicial response to this judicially created paradox has not yet been recognized for what it is: a failure to separate the questions of internal state power and internal state integrity.[64] Sovereignty is two-pronged in nature. It consists of power and discretion. Power allows the sovereign to effectuate its wishes with as little external interference as possible. Discretion is the sovereign's ability to order its priorities, to determine the manner in which it will achieve them, and to compose the nature of its own infrastructure.[65]

The battles which have taken place between the state and federal governments have been perceived to have been fought over power. The resolution of this question of power was thought to be dispositive of the question of autonomy, but not that of the existence of state sovereignty. The reverse is true.

The power of the states has passed irretrievably from the scene. This power is a necessary requirement for sovereignty. Justice Douglas misses this point when he argues in *New York v. United States*[66] that state sovereignty must exist unless expressly given up and that until explicitly abandoned, it retains the strength to buffer federal power.[67] Similarly, Justice Rehnquist, in *National League of Cities v. Usery*,[68] rests his anal-

[60] When the state governments fail to satisfy the needs of the people, the people appeal to the Federal Government. Whether the question is one of the advancement of human knowledge through research, of law and order or the right of all persons to equal protection of the law, the Federal Government need become involved only when the states fail to act.

(quoting Chief Justice Warren in A. Mason & W. Beaney, The Supreme Court in a Free Society 310 (1959).)

[61] Such a change may indeed be what is required in order for the United States to respond to the requirements and needs of its citizens and the exigencies generated by the international community. Yet, insofar as our Constitution is *the* law from which our system emanates and since its integrity is crucial for the continuing integrity of the system, the uses to which it is put must remain in harmony with the spirit of the document. For the states to become only integrated components within a master system, without character of their own, a constitutional amendment should be required, not judicial fiat or legerdemain.

[62] Kurland, *supra* note 2, at 163. All that remains to be determined is how much power Congress cares to exercise. *See* Murphy, *State Sovereignty and the Constituition—A Summary View*, 33 Miss. L. Rev. 353, 358 (1962). *See also,* Kurland, *supra* note 2, at 144.

[63] *See* United States v. Darby, 312 U.S. 100, 115 (1941).

[64] Although the language and intent of National League of Cities v. Usery, 426 U.S. 833 (1976) is the closest comprehension yet.

[65] Discretion is the internal orientation of the state. Thus, within constitutional parameters, the state has the discretion to determine the rank order and distribution of its resources, e.g. whether it will pursue an expansive highway building program or pursue a policy of fiscal restraint, or indeed, whether it will have any policies at all. Moreover, discretion reaches the internal structure of the state, as the state is the determiner of how it will organize itself.

[66] 326 U.S. 572 (1946).

[67] *Id.* at 594–96.

[68] 426 U.S. 833 (1976).

ysis on "states as states" and fails to recognize that what he means is not state sovereignty at all. Sovereignty in substance has been disemboweled by the loss of power. The response of the South to the order for school desegregation and the reaction of the nation to the South, in consequence, clearly demonstrate that state sovereignty, if it exists at all, is only a hollow shell once power has passed.[69]

However, the second of the components which comprise state sovereignty—discretion—has not been destroyed. Nothing in the passing of power (except, perhaps, its coercive potential)[70] has served to strip the states of their discretion. Power is not necessary to its exercise, for discretion is self-sufficient, representing the core of the spirit of the institution; it will decide in what manner it will act, unless forced to do otherwise. Clearly, the states will decide in what manner they ought to act. This prerogative is all that remains from their former sovereign status. Yet it does remain, and while, like the prerogatives of the national government, it must conform to certain constitutional requirements, it, too, is constitutional in stature and may act to protect itself, much like the right of privacy serves to insulate the prerogatives of the individual.[71] The residuary discretion of the state is the state's right of autonomy.[72]

Justice Frankfurter in *New York v. United States*[73] recognized that:

> There are, of course, State activities and state-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves.[74]

These activities and properties and those alluded to in Chief Justice Stone's concurring opinion[75] are but a single facet of the right of autonomy. Not only are the symbols and seat of the state necessary to the autonomy of the state, but the very process of decision-making by the state is subsumed within the right. This decision-making process is the ability of the state to determine in what areas and in what manner it will act to serve its citizenry. This process allows each state to retain its character, express its values, and yet fulfill its constitutional requirements. Autonomy gives each state an opportunity for a separate personality. While the potential for separate personalities is not the goal of the right of autonomy, it is a highly viable means of perceiving its existence.

If taken to extreme, the right to autonomy could just as easily destroy the national government as the national government is currently eviscerating the states.[76] Thus, it is a right which must weigh against other rights and powers found in the Constitution and does not provide the states with an absolute protection. The right of autonomy for the states does offer them, however, the constitutionally required opportunity to preserve themselves.

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[69] This is the question, or rather, non-question, of interposition, the placing of a state's sovereignty between the people of the state and a federal determination. *See* 1 RACE REL. L. REP. 437–47; Cooper v. Aaron, 358 U.S. 1, 18 (1958); Bush v. Orleans Parish School, 364 U.S. 500 (1961) (per curiam). *See also,* Ableman v. Booth, 62 U.S. (21 How.) 506 (1859); U.S. v. Peters, 9 U.S. (5 Cranch) 115 (1809).

[70] For example, the power of the purse, (*i.e.*, conditional spending.) *See* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).

[71] *See* Griswold v. Connecticut, 381 U.S. 479 (1965).

[72] *Cf.* Monaco v. Mississippi, 292 U.S. 313, 323 (1934). That the right to autonomy is of constitutional dimension ought to be without challenge. The states formed the Constitution. The states and the people ratified and accepted the Constitution. Its existence was for the states' protection, not their extermination. The constitutional protections for and concerning the States (art. IV); the constitutional prohibitions against the states (art. I. § 10); and the nature and responsibilities necessitated in choosing the legislative (art. I, § 4 and amend. XVII) and the executive (art. II, § 1) all require that the states retain the ability to exercise their discretion in order to achieve or not achieve certain ends.

In Dandridge v. Williams, 397 U.S. 471 (1970), an attempt by the state of Maryland to place a maximum ceiling on the benefits it distributed through its AFDC program was upheld by the Supreme Court. Justice Stewart's opinion for the majority characterized the Maryland action as a state's attempt "to reconcile the demands of its needy citizens with the finite resources available to meet those demands." *Id.* at 472. This ability to make such determinations, free from unwarranted external intervention is the heart of the discretion, the autonomy, of the states. *Dandridge* also provides an example of the constitutional limits of the right to autonomy. For, as the dissent vigorously argues, the manner in which the state exercised its discretion was a violation of the equal protection, required by the fourteenth amendment. *Id.* at 508 (Marshall. J., dissenting).

[73] 326 U.S. 572 (1946).

[74] *Id.* at 582.

[75] *Id.* at 587–88.

[76] *See* South Carolina v. United States, 199 U.S. 437, 454–56 (1905).

III. Emergence of the Right of Autonomy

Taxation Cases

> Certainly if all the provisions of our Constitution which limit the power of the Federal government and reserve other power to the States are to mean anything, they mean at least that the States have the power to pass laws and amend their constitutions without first sending their officials hundred of miles away to beg Federal authorities to approve them.[77]

The taxing power is one which is concurrently held by the state and national governments.[78] It retains within it the greatest potential of all governmental powers for constructive and destructive impact.[79] In a non-unitary system, such as ours, the ability of one government to tax the corpus of the other represents a tremendous threat to the balance upon which that system must be based.

The traditional judicial response when one institution attempted to tax an aspect of another was to disallow the tax as a threat to sovereign immunity, although nothing explicitly within the Constitution required this. Thus, states were not allowed to tax any aspect of the federal government.[80] This denial went so far, at one time, as to bar state taxation of the income of federal employees living within a state.[81] When the occasion arose, the states were found to enjoy reciprocal protection.[82] Reciprocity is effective in delimiting the effects of a concurrent power, so long as the line between the two governments is clear. But as the distinction between nation and state in governmental functions began to disintegrate following the Civil War, it became increasingly more difficult to retain a symmetry. The natural result was to permit the national government to tax various state actions, even if they were conducted within the legitimate exercise of state power.

In *South Carolina v. United States*,[83] the federal government attempted to tax a state monopoly of the alcohol trade. This state creation of a monopoly had been previously upheld by the court as a legitimate exercise of the state's police power.[84] At this time, the federal government taxed every dispenser of alcoholic beverages. Indeed, one quarter of all the income of the federal government in 1901 came from this tax.[85] The Court denied South Carolina immunity from federal taxation, finding that such an activity was not a traditional function of the state and thus not deserving of the same quality of protection. In this situation, the Court treated the state no longer as a state, but as any other corporation.

What was occurring was an expansion of the federal taxing power at the cost of state independence.[86] Thus, even if the state could show a clearly legitimate interest and power to reach a subject, the federal power could still reach the same subject and control its behavior. It was becoming the nature of the federal power to tax, to reach all activities, even those which the state could legitimately pursue.[87]

The watershed on this question and the true beginning of thoughtful, though muddled, enunciation of the right to autonomy occurred in the direct lineal descendent of *South Carolina v. United States*, *New York v. United States*.[88] The untoward division of the Court, occasioned by the seriousness and haziness of the issue, added both to a greater expression of views than had

[77] South Carolina v. Katzenbach, 383 U.S. 301, 359 (1966) (Black, J., dissenting).

[78] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 425 (1819).

[79] *Id.* at 427.

[80] *Id.* at 430.

[81] Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842).

[82] Collector v. Day, 78 U.S. (11 Wall.) 113, 124 (1870).

> The [national government] in its appropriate sphere is supreme; but the States within the limits of their powers not granted; or, in the language of the tenth amendment, "reserved", are as independent of the general government as that government within its sphere is independent of the states.

[83] 199 U.S. 437 (1905).

[84] Vance v. W. A. Vandercook Co., No. 1, 170 U.S. 438 (1898).

[85] Secretary of the Treasury, Annual Report 7, 21 (1905).

[86] Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.

Ex parte Virginia, 100 U.S. 339, 346 (1879).

[87] It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

United States v. Darby, 312 U.S. 100, 114. *See also*, New York v. United States, 326 U.S. 572, 582 (1946) (Frankfurter, J.).

[88] 326 U.S. 572 (1946).

previously been aired and to a tendency to obscure the nature of the right of autonomy.

In *New York v. United States*, the state of New York was bottling and selling mineral water obtained from Saratoga Springs, which was owned and operated by the state. Such sales were taxed by the federal government. The state argued that the federal government ought to be barred from taxing actions of a state taken in an effort to conserve that state's natural resources. The federal government contended that the doctrine of *South Carolina v. United States* was dispositive and foreclosed the state's argument. The Court, divided 2–4–2,[89] upheld the federal government.

Justice Frankfurter wrote the "majority" opinion of the Court.[90] He felt that *South Carolina* was dispositive. The federal taxing power was plenary. However, he openly disliked the state-governmental-function/state-government-as-business distinction, feeling, rather, that the question of limits to the congressional taxing power was not within the Court's purview,[91] so long as the tax did not discriminate against or otherwise unfavorably single out the state enterprise.

Chief Justice Stone wrote the "plurality" opinion, in which Justices Reed, Murphy, and Burton concurred. While likewise upholding the validity of the tax as applied to New York, the Chief Justice was not satisfied that the only constitutionally mandated limit on the federal taxing power was that it not discriminate against the state. He reasoned that there were activities and functions which were unique to the state because of its status as a sovereign and which were outside the reach of the federal power:

> If we are to treat as invalid, because discriminatory, a tax on State activities and State owned property that partake of uniqueness from the point-of-view of intergovernmental relations, *it is plain that the invalidity is due wholly to the fact that it is a State which is being taxed so as to unduly infringe, in some manner, the performance of its functions as a government which the Constitution recognizes as sovereign.*[92] (Emphasis added)

The sale of mineral water is not this type of governmental function, according to Justice Stone, but he expressed his doubts as to the constitutionality of federal taxes on "the State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands."[93] The important thing, according to Justice Stone, was to limit the potential deleterious impact of federal taxation on state projects, thus protecting state sovereignty without imposing too great a cost upon the federal government in lost revenue.[94]

In dissent, Justice Douglas, joined by Justice Black, also rejected the view that the federal tax power is plenary when not discriminatory. For Justice Douglas, *South Carolina* was wrongly decided. Rather, the appropriate test should focus on whether the activity is within the state's power to initiate or operate. If so, it should be beyond the reach of the federal tax power. The mere fact that a state's activity was one in which it attempted to make a profit or was in a field formally reserved for private enterprise ought not to have any bearing upon the status of the state's tax immunity. Indeed, Justice Douglas viewed the immunity as a crucial factor in the continued maintenance of the federal system: "The Constitution is a compact between sovereigns."[95] Consequently, to let one sovereign tax the other's activities and projects is to relegate the states to a servile status vis-a-vis the national government.

> They [the states] become subject to interference and control both in the functions which they

[89] Justice Jackson did not participate.

[90] Though it was presented as the majority opinion, only one other Justice, Mr. Justice Rutledge, concurred in it and even he wrote a separate opinion. It is more aptly considered a "consensus" opinion.

[91] *Id.* at 581–82.

[92] *Id.* at 588.

[93] *Id.* at 587–88.

[94] Chief Justice Stone, quoting from Metcalf & Eddy v. Mitchell, 269 U.S. 514, 523–24 (1926).

> But neither government may destroy the other nor curtail in any substantial manner the exercise of its powers. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation cannot be so varied or extended as seriously to impair either the taxing power of the government imposing the tax . . . or the appropriate exercise of the functions of the government affected by it.

326 U.S. at 589–90. *See also*, South Carolina v. United States, 199 U.S. 437, 452 (1905).

> [T]he two governments, National and state, are each to exercise their power so as not to interfere with the free and full exercise by the other of its powers.

[95] 326 U.S. at 592.

> exercise and the methods they employ. They must pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution.[96]

Thus, in *New York v. United States*, a majority of the Supreme Court[97] found, so far as the taxing power of the federal government was concerned, that the status of the states as sovereigns, implicit and interwoven within the text of the Constitution, did operate to make a substantive limit to that power. This majority split over both the substance of that power, in general, and as applied to facts of the case. Beyond the broad rule suggested by Justice Douglas and the off-hand-examples of Chief Justice Stone, little was said to explain the nature or source of this implied right. Thus, wrapped in shadowy ambiguities and acknowledged only by its absence, the right of autonomy first appeared.

The Commerce Power

Eighteen years later, in *Maryland v. Wirtz*,[98] an attempt was made to utilize the rough concepts of state sovereignty outlined in *New York* to establish a buffer against the otherwise plenary power of the federal government concerning interstate commerce. Congress had amended the Fair Labor Standards Act, concerning minimum wages and overtime benefits, so that its provisions would reach any employee at a state school or hospital, who was in a non-executive, administrative or professional position. On its face, the Act served only to provide mandatory guidelines for employee treatment, yet it actually went far in directing the distribution of limited state funds.[99] This time, a six-man majority found there was no implied right protecting the states, at least insofar as the interstate commerce power was concerned.[100]

Justice Harlan, writing for the majority, found that *United States v. Darby*[101] laid out the dimensions of the commerce power. Once a company or institution fell reasonably within the definition put forth within the act, it was constitutionally subject to the regulation of the Congress. That the company or institution was owned by, operated by, or was an integrated component of a state government was irrelevant to the exertion of federal control and power:

> If a state is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.[102]

Justice Harlan emphasized the plenary aspects of the commerce power and the rationality of its connection to the extension of the Act so as to reach the states, and rejected any doctrine forbidding or limiting federal interference with the actions and powers of the states.[103]

Justice Douglas again took up the side of the states. While Justice Harlan's opinion did not even make mention of *New York*,[104] the reason-

[96] *Id.*

[97] This "majority" consisted of Chief Justice Stone and the three justices concurring in his opinion and the dissenters, Justice Black and Justice Douglas.

[98] 392 U.S. 183 (1968).

[99] *Compare with* Dandridge v. Williams, 397 U.S. 471 (1970).

[100] The Court divided 6–2, with Justices Douglas and Stewart dissenting. Justice Marshall did not participate.

[101] 312 U.S. 100 (1941).

[102] 392 U.S. at 197; also

> It [The Supreme Court] will not carve up the commerce power to protect enterprises indistinguishable in their effect on commerce from private businesses, simply because those enterprises happen to be run by the States for the benefit of their citizens.

Id. at 198–99.

[103] There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other.

Id. at 195.

For precedent Justice Harlan relied principally upon Case v. Bowles, 327 U.S. 92 (1946). In *Case*, the price of timber had been given a ceiling by the administrator under the Emergency Price Control Act during World War II to control product costs. The state of Washington had certain timberlands set aside to provide income for its schools. It sold at auction some of these lands for a price greater than that allowed under the Act. The Supreme Court upheld the administrator and enjoined the sale. The Act had been passed pursuant to the Congress' war power. Its approval is illustrative of the Court's bending to the will of the national government in times of emergency. *See also,* Korematsu v. United States, 323 U.S. 214 (1944). Being concerned with the war power, it cannot be dispositive on the reach of the commerce power *vis-a-vis* the state's right to autonomy.

[104] The majority did, however, find the time to quibble over Justice Douglas's interpretation of Wickard v. Filburn, 317 U.S. 111 (1942). Justice Douglas's syllogism was

ing of the "majority" in that case was Justice Douglas' keystone. He found that the threat of extinction to state governments through unbridled use of the commerce power had implication for the states every bit as lethal as the tax power had had in *New York*.

Federal Oversight

Abstention by federal courts is a judicial construct first given clear form in Justice Frankfurter's opinion in *Railroad Comm. of Texas v. Pullman*[105] in 1941. Abstention occurs when a federal court refrains from acting on a question over which it has jurisdiction but which "touches upon a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to adjudication is open."[106] Thus, federal courts of equity were required not to act in certain cases pending state determinations of policy. Clearly, this doctrine contains a good deal of deference to the state's ability to determine policy. However, the federal court had only to stay proceedings pending the state determination; afterwards the action to review in federal court remained alive. This was equitable abstention.

This principle expanded somewhat in the years that followed, so that it reached not only constitutional questions before state attempts at limitation and construction, but also "unseemly conflict between the sovereignties" and actions which might unduly hinder state functions.[107] This expansion has not continued unchecked in the recent past, however, as the current cases fit less and less easily into the flow of the past. With the addition of Chief Justice Burger in 1969 and Justice Blackmun to the Supreme Court in 1970,[108] the Court has moved with rapidity, for an institution so akin to glacial flow, to limit the encroachment of the national government upon the states, and, if possible, reverse it.

The new Court acted first in the area which was least dangerous or controversial, the judicial construct of abstention. In doing so, it was able to reaffirm the integrity of the state judicial forums, avoid any direct Constitutional questions as to the status of the states, and restore, somewhat, the state power to decide questions of criminal law. Thus, in its second term, the Burger court established the principle of federalism abstention.

In *Younger v. Harris*,[109] the defendant had been indicted for violation of the state Criminal Syndicalism Act. Before the charge went to trial, Harris sued in federal court to have the act stricken down as unconstitutional. The three-judge court struck down the act as vague and overbroad. The Supreme Court reversed, eight to one, without reaching the merits. The Court found that the history of the country was one based on a belief in the federal system. Such a belief specifically excluded federal interference with state criminal prosecutions except as the state government showed itself to be incapable of acting as it was supposed to. To reinforce the belief that a state criminal proceeding was a just and fitting forum, the Supreme Court limited federal court interference in a state criminal prosecution to cases involving unjustified state harassment or irreparable injury. The heart of this policy was the state-national relationship of federalism, characterized as:

The exercise of the commerce power may also destroy state sovereignty. All activities affecting commerce, even in the minutest degree, *Wickard, supra*, may be regulated and controlled by Congress. . . .

Yet state government itself is an "enterprise" with a very substantial effect on interstate commerce. . . .

If all this can be done, then the National Government could devour the essentials of state sovereignty. . . .

392 U.S. at 204–05. The majority responded that: Neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities. The Court said only that where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute are of no consequence.

392 U.S. at 197 n. 27. This exchange highlights Justice Harlan's and the majority's lack of understanding as to the issue involved. Even if *Wickard* only allows an extension of federal power to trifling situations rather than defeat a general regulation, *Wickard* is only an aftermath situation. It is the allowance of the general regulation in all circumstances, such as the instant case, that is the heart of the controversy. *Wickard* cleans up the pieces. *Maryland* shatters the porcelain.

[105] 312 U.S. 496 (1941).

[106] *Id.* at 498.

[107] *See generally*, Martin v. Creasy, 360 U.S. 219 (1959).

[108] Chief Justice Burger took the oath on June 23, 1969 and Justice Blackmun took the oath on June 9, 1970.

[109] 401 U.S. 37 (1971).

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states.[110]

Even Justice Douglas, the only dissenter, does not dispute the nature of the federal relationship. However, particularly in light of his fierce advancement of the meaning of the first amendment safeguards,[111] he continued to distrust the states' ability and desire to exercise and provide those safeguards for their citizens.[112]

Federalism abstention was, initially, an instrument primarily for the preservation of the integrity of the state's criminal judicial system. Two years later, the reach of this federalism was extended to the executive and the legislative branches. Pennsylvania had passed a law allowing private, sectarian schools to be reimbursed for certain secular educational functions performed by them. This statute was struck down by the Supreme Court as being violative of the first amendment in *Lemon v. Kurtzman* (I).[113] Following that decision, the state reimbursed those schools for the secular functions they had performed prior to the Supreme Court's decision. The plaintiffs attacked this action as being violative of the first amendment. The Supreme Court upheld the state action in *Lemon v. Kurtzman (II)*.[114]

Among the plaintiff's attacks was that there could be no justified reliance upon the statute until validated by the courts. This argument was peremptorily rejected. A sovereign government must act as if it is sovereign.[115] Indeed, to find otherwise would require federal approval for almost every action of state government before it could be effectuated. To an extent, this merely is a rephrasing of the presumption of contsitutionality which attaches to all challenged state laws and actions. But the Court was extending the concepts of federalism and state autonomy from mere judicial abstention in criminal matters. The record of the Supreme Court in the 1970's is one of a continuing expansion of the recognition of federalism and its substantive concerns.

The ability of the federal courts to safeguard federal constitutional rights as against the states was limited severely again, when the Supreme Court decided that habeas corpus review by the federal courts did not include questions of fourth amendment search and seizure.[116] The rationale for this decision was a balancing test of competing interests. While the case seems to be primarily an exposition on the weaknesses of the exclusionary rule, the Court did not ultimately deal with that issue[117] and found that the fourth amendment interests were outweighed by the harm habeas corpus review caused the states' criminal justice system.[118] The result is premised on the ability and willingness of the state to provide a full and fair hearing for the defendant. Since the provisions of the fourth amendment are constitutional in nature, they can only be outweighed by interests which are constitutional in quality. The counter-balance, in this case, is the integrity of the state judicial system. The federalism concerns first articulated in *Younger* have now attained constitutional dimensions.

The question might be raised as to how these abstention and habeas corpus cases relate to a state's right to autonomy. A state's right to autonomy is no more plenary than any federal power, as each retains substantive limits: due process or equal protection, or an affirmative constitutional prohibition, express or implied, to name but a few. The integrity of the state's administrative apparatus, the ways and means that it creates, discharges, and upholds its laws, are critical to its operation as a sovereign entity. Any argument that such operations could be completely free of federal oversight disappeared with the passage of the Civil War Amendments. While those amendments did

[110] *Id.* at 44.

[111] *See* Brandenburg v. Ohio, 395 U.S. 444, 450 (1969). (Douglas, J., concurring)

[112] In times of repression, when interests with powerful spokesmen generate symbolic pogroms against nonconformists, the federal judiciary, charged by Congress with special vigilance for protection of civil rights, has special responsibilities to prevent an erosion of the individual's constitutional rights.
401 U.S. at 58.

[113] 403 U.S. 602 (1971).

[114] Lemon v. Kurtzman, 411 U.S. 192 (1973).

[115] "[G]overnments must act if they are to fulfill their high responsibilities." 411 U.S. at 207.

[116] Stone v. Powell, 427 U.S. 465 (1976).

[117] *Id.* at 482, n. 17.

[118] *Id.* at 491.

not truncate the states' power, they did form buffers and guidelines for its use. The balance between the power of the federal government to enforce those amendments within the states' operations and the ability of the states to view the guidelines without federal interference has shifted markedly. In part, this has been the result of the loss of state hostility to many of the procedures and processes made mandatory. But the substantive shift has been toward a greater belief in the ability of the state to govern itself and the superfluous nature of federal oversight.[119]

While these may appear trivial as to the question of an implied constitutional right, these cases are symptomatic of a growing realization on the part of the Supreme Court that the state does have a substantive right of autonomy, embedded within the fabric of the Constitution. It is a power which not only constitutes a material bumper to the exercise of federal power but also may act to channel the process of the implementation of individual rights, though not the substance of those rights.[120]

National League of Cities v. Usery

The most dramatic step toward recognition of the state right of autonomy by the Supreme Court has been the striking down of a federal statute based upon the exercise of the commerce power for its undue interference with "the States *qua* states". It is primarily a resuscitation of the plurality position by Chief Justice Stone in *New York v. United States*,[121] but where that decision recognized the right but upheld the law, this one both recognizes the right and provides it with some bite.

The federal Fair Labor Standards Act, whose application to certain state employees had been upheld by the Court in *Maryland v. Wirtz*,[122] was amended in 1974 so as to apply to nearly all employees of the states and their political subdivisions. Rejecting the authority of *Maryland*, the Court, relying heavily upon Chief Justice Stone's concurring opinion in *New York*, found that in balancing the federal commerce power against the intrusion by the statute into state functions, the federal statute exceeded its permissible impact.[123]

Justice Rehnquist, writing for the Court in *National League of Cities v. Usery*[124] found that the statute imposed substantial costs upon the state and impinged upon the ability of the state to determine the manner in which its money is spent.[125] Clearly, these are interrelated areas. Where an institution has only a limited income, money which is required in one field will require diminution of expenditures in another field. The actual question is one of disruptiveness to the internal operations of the state, the state's right to be autonomous.

While this opinion could have been the platform for the airing of the full considerations making up the right to autonomy, it was not. Indeed, the legal and constitutional analysis was somewhat weak overall. The Court first acknowledged the plenary nature of the interstate commerce power with the obligatory quotations from *Gibbons v. Ogden*[126] and *Heart of Atlanta Motel v. United States*.[127] Then limits upon that power by the provisions of the Bill of Rights are cited. Finally, Justice Rehnquist more or less established state sovereignty as an admixture of the tenth amendment and the language of Chief Justice Stone's opinion in *New York*.[128] These components, based upon the indestructibility of the states, fashioned, in the Court's judgment, the constitutional nature of states as states. The federal power over commerce was found to be sufficiently outweighed

[119] *Id.* at 493.

[120] It is important to recognize that the right of autonomy for the state cannot limit the requirements of the Civil War Amendments. Those amendments concern the rights of individual people. Autonomy concerns the relationship of the state and national government. The amendments were passed to provide substantive limits on the states. The federal government may become involved by determining the means of ensuring those rights, that is where the right of autonomy may act. It may affect the means, but never the substance of the individual rights.

[121] 326 U.S. 572 (1946).

[122] 392 U.S. 183 (1968). *See* text accompanying notes 126–32 *supra*.

[123] National League of Cities v. Usery, 426 U.S. 833 (1976). Justice Rehnquist does not characterize his opinion as a balancing test. Rather, he finds the rights of the States entrenched and the federal commerce power too little to move them. *Id.* at 852. However, the decision was 5–4, and Justice Blackmun, while joining in the opinion of the Court, in a concurring opinion, made explicit his belief that this was a balance being drawn.

[124] 426 U.S. 833 (1976).

[125] *Id.* at 848.

[126] 22 U.S. (9 Wheat.) 1 (1824).

[127] 379 U.S. 241, 262 (1964).

[128] 426 U.S. at 842–43, *quoting* Fry v. United States, 421 U.S. 542 (1975).

by the burdensome costs and the impact upon state priority-setting. Consequently, the act was stricken down. As a post-script, the contradictory holding of *Maryland v. Wirtz*[129] was overruled and the contrary dictum in *California v. United States*[130] disapproved.

The heart of the decision is, simply put, that "States as States stand on a quite different footing than an individual or a corporation when challenging the exercise of Congress' power to regulate commerce."[131] The source of that difference is neither explained nor clarified by the Court, however, and, it is this failure to give fuller body to the right of autonomy which provides the dissent with its plentiful ammunition.

In dissent, Justice Brennan reaffirms the plenary nature of the federal commerce power. First, he establishes the supremacy of the national government.[132] *New York* is distinguished on the ground of tax immunity of the state, the tax power being held concurrently, while commerce is a plenary power of the national government.[133] It is the Court's failure to fully explain why states are entitled to be treated differently than individuals, for surely the tenth amendment language includes both the states and the people, that must be remedied in order to make clear the substantive nature of the state's right. Justice Brennan's analogy to the discredited logic of *Carter v. Carter Coal Co.*[134] and *United States v. Butler*[135] misses the nature of the state's right involved here as compared to the reactionary proclivities exercised in these earlier cases. This difference is the quality of the areas protected by the right of autonomy, a right which Justice Rehnquist does not however, successfully describe.

National League of Cities marks the latest stage in the Burger Court's progress towards a substantive understanding of the position of the states in the post-Civil War constitutional framework. However, as the dissenting opinion shows, it is not the bottom line which is not understood, but the pathway which leads there. The Supreme Court has thus far been unable coherently to formulate and thereby recognize the right of autonomy. This inability is to a great extent undoubtedly reflective of the nation as a whole, and shows the declining importance, power, and prestige of the states.[136] In passively viewing the passing of the states, the Court has removed itself from the document which it has a duty to faithfully expound.

IV. Right to Autonomy

In summary, then, the Supreme Court in *National League of Cities* and *Stone v. Powell* has begun to recognize substantive limitations to the exercise of federal power. As of the moment, though, it has been unable to overcome the rhetoric and the tunnel vision of the past and continues to deal with federal-state relations based upon the tenth amendment structure. This has caused the Court to have to struggle unnecessarily to reach the proper constitutional conclusion in some cases and, occasionally, to miss it altogether.

The right to autonomy is a narrow concept. Since it consists of only those prerogatives necessarily retained by the state in order to preserve the federal nature of the constitutional system, the potential exists for a good deal of disagreement as to where the flash point is. Indeed, the strongest proponents of the right disagree on a very important point of potential application: the ability of the federal government to ensure rights guaranteed to individuals by the Constitution through the Bill of Rights. This ability can be characterized as its oversight power. It is qualitatively distinct in origin, exercise, and goals from the plenary federal powers.[137] As a result of these differences, Justice

[129] 392 U.S. 183 (1968).

[130] 297 U.S. 175 (1936). In *California*, federal safety requirements were found to apply to a state railroad, regardless of the reasons for state ownership.

[131] 426 U.S. at 854.

[132] "[It] is not a controversy between equals" when the federal government "is asserting its sovereign power to regulate commerce. . . . [T]he interests of the nation are more important than those of any State."
Id., quoting Sanitary District v. United States, 266 U.S. 405, 425-426 (1925).

[133] Yet, Justice Brennan fails to recognize that the source of the state's tax immunity is the autonomy of the state in the first place. *See* 426 U.S. at 843 n. 14.

[134] 298 U.S. 238 (1936).

[135] 297 U.S. 1 (1936).

[136] *See* J. Bryce, 1 The American Commonwealth 562 (1908); Laski, *The Obsolescence of Federalism*, 98 New Republic 367 (1939). *See also* note 62 *supra*.

[137] The origin of the oversight power lies principally in the language of the Civil War Amendments which are addressed primarily to the states. Its exercise is as an intervenor between the state and the individual, piercing the autonomy of the state. The goal of the oversight power is to protect the individual from unconstitutional treatment from the states.

Douglas found that the state's right to autonomy could not apply to limit the power of the national government.[138] Conversely, Justice Rehnquist and a majority of the current Court have applied the right to autonomy in just such a manner, to the detriment of the federal power.

The right to autonomy concerns the federal personality of the system. It deals only with the direct federal-state relationships. Thus, where the federal government interferes with legitimate state autonomous interests, the state is constitutionally protected. Yet such interests do not reach to those rights, privileges, and immunities guaranteed to individuals by the Constitution. These individual interests exist regardless of the federal structure of the system.[139]

The autonomous interests of the state are threefold: internal control, internal ordering, and internal integrity. Internal control pertains to the ability of the state to rank order decisional priorities, to be able to decide what gets done first. Internal ordering is the ability of the state to determine the structure and nature of its governmental organizations, to be able to determine what agencies exist and in what sense. Internal integrity describes the ability of the state to protect its interests. These are the minimum necessary for a state to retain its individual character in a world without power. It is the right to autonomy.

V. Conclusion

The government in the United States, as established in the Constitution, is a federal system. A federal system requires two tiers of government, non-wholly integrated and semi-independent. Originally, the states were sovereign entities. The course of constitutional interpretation has succeeded in all but depriving them of separate power, as the delegated powers of the national government have become, effectively, all powers. There is some quantum below which any governmental system becomes non-federal in nature, regardless of label. The need to remain above that quantum is a constitutional requirement, as the federal nature of the government is constitutional in quality. That quantum is supplied by the right of the states to be autonomous.

The past one hundred years has been a chronicle of the continuing eclipse of the states in the constitutional framework, often through the myopia of good intentions of the Supreme Court. This eclipse has been the result of the inability of the states to conform to constitutional requirements, the increasing power and import of the national government, and the distaste of states' rights which has lingered from the Civil War even until today. The Supreme Court is only slowly recognizing both the need and the nature of the right of autonomy.

[138] *See* note 112 *supra*.

[139] That is, the various constitutional protections guaranteed the general citizenry would be applicable if only the states existed or if only the national government existed. The federal system is superfluous to their vitality and value.